Supreme Court, U.S.
FILED

No. 03-1499 MAR 16 2004

OFFICE OF THE CLERK

In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN RANDOLPH INGRAM
618 Sunset Avenue - Suite 100
Asheboro, NC 27203
(843) 455-3301
Petitioners' Counsel of Record

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals violate the principles of **Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579,113S.Ct.2786, 125 L.Ed.2d 469 (1993)**...in upholding the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation" and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses, who were sequestered from hearing the testimony of each other in a re-trial which resulted in one defendant obtaining a judgment against the other for $12 Million?

Will this court order a ruling on Plaintiffs' Rule 60 Motion, filed about 3 years ago, with the affidavit of Dr. Lewell D. Brenneman, because the Trial Court ruled inadmissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin, (whose testimony was **ruled admissible by a First Circuit Trial Judge**) without considering any testimony from another immunologist specialist and without giving Plaintiffs an opportunity to present evidence from another immunologist specialist, Dr. Lewell D. Brenneman, who testifies by affidavit, below: "Dr Levin's methodology, as expressed in his affidavits and deposition, which I have reviewed for the Marsh, Speer and McLeod cases, is generally accepted among immunologists and has been subjected to peer review. This description would be clear to a practicing physician who is conversant with immunology and biological regulatory mechanisms."?

Is there a conflict in the trial courts of the First and Fourth Circuits in the recognition of Dr. Levin, an immunologist medical experts; and is there a conflict in the trial courts of the United States for the Middle and Eastern Districts of North

Carolina. Grace was granted a New Trial so it could prove 2-4D in its fertilizer; yet these Plaintiffs', after they forced Grace to produce photographs of their 1984 tobacco and submitted them for Dr. Kittrell's Deposition, below, were not allowed to have 2-4D considered as a contaminate by the court or Dr. Levin. (Dr. Levin's testimony was allowed by the court in a case which prompted EPA hearings in the Woburn contamination, which required Defendant, W. R. Grace, to pay approximately $69 Million Dollars to clean up the Woburn chemical contamination. This was the subject of the case before U.S. District Judge Skinner,who ruled admissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin.)(Dr. Levin's testimony was **ruled admissible by this First Circuit Trial Judge** long before the EPA cleanup and together with an undaunted trial lawyer inspired the movie, "A Civil Action.")

Did the trial court err and contribute to problems in these cases by refusing to consolidate Speer and McLeod with Marsh, and entering a Pretrial Scheduling Order only for Marsh, therefore, leaving plaintiffs'counsel and clients to expect a separate Pretrial Scheduling Order for Speer and McLeod with time thereafter for discovery, amendments, motions etc., which was not entered as provided in Rule of Civil Procedure (16b)?) **The Magistrate Judge denied Plaintiffs an inspection of the premises of Fritt** . He also restricted counsel from discussing with his clients the sources of the metals and waste materials from which the micronutrient mix was manufactured.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

OPINIONS AND ORDERS BELOW..... 1

STATEMENT OF JURISDICTION..... 1

CONSTITUTIONAL PROVISION INVOLVED..... 2

STATEMENT OF THE CASE

Proceedings Below..... 2

Statement of Facts..... 4

REASONS FOR GRANTING THE WRIT.....17

The Court of Appeals violated the principles of **Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579,113S.Ct.2786, 125 L.Ed.2d 469 (1993)**... in upholding the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation." and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses, who were sequestered from hearing the testimony of each other in a re-trial which resulted in one obtaining a judgment against the other for $12 Million?

TABLE OF CONTENTS (CONT'D)

Page

CONCLUSION.....21

APPENDIX.....A-1

TABLE OF AUTHORITIES

Cases **Page**

Ambrosini v. Labarraque, 101 F.3d 129(1996).....20, 21

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ...17, 21

Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962)*.....17

OPINIONS AND ORDERS BELOW

The District Court Judgment granting Defendants' Motion for Summary Judgment is as follows:

JUDGMENT

For the reasons described in the Memorandum Opinion filed contemporaneously with this Judgment, Defendants' motions for summary judgment in each of the above captioned cases are hereby GRANTED. Any remaining motions are DENIED as MOOT.

This the 26 day of May 1998.

s/N. Carlton Tilly
United States District Judge

The unpublished Opinion of the Fourth Circuit Court of Appeals, affirming the judgment of the district court is in the Appendix at A-1. The Order of the Fourth Circuit Denying Defendants' Petition for Rehearing and Petition(s) for Rehearing En Banc is set forth in the Appendix at A- 12.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Order of the United States Court of Appeals for the Fourth Circuit Denying Plaintiffs' Petition for Rehearing and Petitioner(s) for Rehearing En Banc was entered on 17 December 2003. The Fourth Circuit's Opinion affirming the judgment of the district court allowing defendants' motions for summary judgment was entered on 19 November 2003 after oral argument 25 January 2000.

CONSTITUTIONAL PROVISION INVOLVED

The Bill of Rights provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The Court of Appeals upheld the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation." and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses (including Dr. Kittrell, who was deceived by Grace), who were sequestered from hearing the testimony of each other in a re-trial which resulted in one obtaining a judgment against the other for $12 Million?

Representative Complaints are included in Dr. Levin's Deposition Exhibits (See JA 2006 and 2052 and JA 3, Docket Entry 1a)

> Paragraph 6 "Grace fertilizer...containing **ingredients** prohibited by law as determined by the North Carolina Commissioner of Agriculture..."
>
> Paragraph 11. "Defendants knew Plaintiff's intestate and Plaintiff had been officially notified that dicamba,

which would disapate and have no effect after 60-90 days, was the only contaminate in the fertilizer."

Representative Peer review articles

Journal of the American Medical Association: "However, quantitative risk assessments used by regulatory agencies to assess risks in populations are not applicable to risks in individuals." Levin Deposition 321, 593,(JA 1557, 1830) Exhibit 16.(Speer Appendix 10) see also Waymon Marsh Affidavit for EPA Advisories, stating their studies are inadequate as to cancer(Marsh Appendix 2)(JA1007-1024) :

MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOXY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Expos ıre to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article lists 2-4D and Picloram as phenoxy acids.

MOLECULAR EPIDEMIOLOGY AND THE GENETICS OF ENVIRONMENTAL CANCER- JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION - 1991.

STATEMENT OF FACTS

Representative Peer Review Articles

Journal of the American Medical Association: "However, quantitative risk assessments used by regulatory agencies to assess risks in populations are not applicable to risks in individuals." Levin Deposition 321, 593,(JA 1557, 1830) Exhibit 16.(Speer Appendix 10) see also Waymon Marsh Affidavit for EPA Advisories, stating their studies are inadequate as to cancer(Marsh Appendix 2)(JA1007-1024) :

MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOLY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Exposure to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article lists 2-4D and Picloram as phenoxy acids.

MOLECULAR EPIDEMIOLOGY AND THE GENETICS OF ENVIRONMENTAL CANCER- JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION - 1991.

These representative peer review articles represent volumes of studies that prove picloram is a phenoxy acid and when combined with other phenoxy acids, such as 2-4D and dicamba, increase the risk 6-fold for soft-tissue sarcomas.

Affidavits of Dr. Kittrell, a Grace witness in Grace v. Fritt, who was allowed to testify about 2-4D and picloram in their second trial; however, his testimony, using photographs of 1984 tobacco (which Grace, by Order had to be compelled to produce) , was not allowed in these cases.

AFFIDAVIT

I, Dr. Benjamin U. Kittrell, being first duly sworn, do depose and say:

1. That I reside at 831 Wedgefield Rd.,Florence, S. C.29501.

2. That I am the resident Director of the Pee Dee Research and Education Center, a division of Clemson University. In that position I am responsible for administering research and education in the areas of tobacco production. During the period 1978-1987 I was Extension Tobacco Specialist for Clemson University and was responsible for the educational program for tobacco which includes the proper usages of tobacco fertilizer and herbicides in conjunction with tobacco growth and production.

3. That, as an expert in the area of tobacco and agronomy, I have testified in several trials, including the Grace v. Frit trials concerning contaminated fertilizer purchased from W. R. Grace & Co. by North and South Carolina farmers in 1984.

4. That the first I heard about the 1984 problem was a call from a South Carolina extension agent indicating a grower in his county had a problem with his tobacco just like the tobacco in the 1979 Smith-Douglas picloram-contaminated fertilizer, which caused the contaminated tobacco to be taken off the market.

5. That, shortly thereafter, I was told that, according to chemical tests, the chemical contaminant was dicamba.

6. That in 1979 I observed extensive picloram damage to tobacco on farms in South Carolina.

7. That in 1984 I observed extensive herbicide damage to tobacco in South Carolina. Again, I was told that, according to chemical tests, the chemical contaminant was dicamba.

8. That, on 20 September 1991, I was shown **Exhibits A, B and C,** which I was informed were obtained from W. R. Grace & Co. by Waymon Marsh and which show that picloram was a contaminate in the tobacco product samples. **Exhibit C** shows this sample was submitted 13 June 1984 and picloram was reported 2 July 1984. I had not seen these exhibits before 20

September 1991 and Grace did not report these tests to me as they were available.

9. That, as an expert in tobacco and agronomy, I have reviewed data for the farm of Theodore McLeod in Moore County North Carolina for the calendar years 1984 through 1991, which includes the affidavit of C. Monroe Enzor, Jr., photographs, Grace insurance adjusters' notes, attached as **Exhibit D,** 1 eaf count damage reports by Grace adjusters, attached as **Exhibit E,** and Statement of Theodore McLeod, attached as **Exhibit F**. Picloram symptoms persist in the McLeod tobacco until 1991; therefore, I concur with the opinion of C. Monroe Enzor, Jr., attached hereto as **Exhibit G.**

10. The best test for picloram is in the tobacco plant; and this test applies to the Theodore McLeod farm. This is similar to a bioassay test; and it indicates that picloram persists in the soil around and beneath the McLeod tobacco plants, which still show picloram symptoms in 1991. James Stevens, N. C. Fertilizer Administrator, concurs with this opinion in his testimony at the Grace v. Frit trial as shown in **Exhibit H.** He testified, "Although the plants were showing severe signs, we could not find anything in the soil, in the fertilizer sample I got at that point."

11. In my opinion, the symptoms of damaged tobacco leaf on the Theodore McLeod farm in 1984 and succeeding years to 1991 were caused by picloram. What the adjusters were calling dicamba in 1984 was picloram, which has persisted in the soil beneath the Theodore McLeod tobacco to 1991. My opinion accepts the truth of the statement of Theodore MeLeod that he has not used any dicamba, 2, 4-D or picloram on his farm from 1984 to 1991, except insofar as the Grace fertilizer he purchased in 1984 was contaminated with picloram, unknown by him until late 1990. Dicamba and 2, 4-D would not have persisted from July 1984 in the Theodore McLeod farm soil into the years 1985-1991.

12. That in my opinion, as an expert in tobacco and agronomy, the Gold Dollar Grace fertilizer used by Theodore McLeod on his farm in 1984 contained substantial amounts of the herbicide picloram, which is illegal for tobacco fertilizer, and

the effects of the picloram were still showing in his tobacco raised in 1991.

13. That it is below the standard of care for a manufacturer to manufacture, produce and sell fertilizer to tobacco growers containing a herbicide such as picloram. In addition these manufacturers of fertilizer and micronutrients knew or should have known that it was foreseeable that a herbicide such as picloram could find its way into their fertilizer and contaminate it, making it unfit for use as a tobacco fertilizer and harmful to the tobacco and other crops, such as garden vegetables, for which the tobacco
fertilizer had been used for years to nurture.

14. That when Monroe Enzore told me his sweet potatoes had symptoms, I told him he should test the fertilizer he had not turned in to Grace for picloram, which he did; and, according to **Exhibit I,** picloram was a contaminate. According to his affidavit he was told by the representatives of W. R. Grace, their adjusters and the North Carolina Department of Agriculture that the only illegal contaminate herbicide in the Grace Gold Dollar fertilizer, which he had used, was dicamba, so he went along thinking that none of their samples tested f or picloram, taking their word that dicamba was the only illegal contaminate in the Grace Gold Dollar fertilizer.

15. During the 1989 Grace v. Frit trial I was asked by the Grace attorneys if the tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by picloram; and I answered "Yes". The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram.

16. During the 1989 Grace v. Frit trial I was asked by the Grace attorneys if the tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by 2, 4-D; and I answered "Yes". The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram; but, in my opinion, some of the symptoms

I observed from the McLeod and Marsh 1984 photographs were consistent with symptoms caused by 2, 4-D.

17. During the 1989 Grace v. Frit trial I was asked by the Grace attorneys if the tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by dicamba; and I answered "Yes". The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram; but, in my opinion, some of the symptoms I observed from the McLeod and Marsh 1984 photographs were consistent with symptoms caused by dicamba.

18. Tobacco plant symptoms I observed in 1984 caused by the contaminated Grace fertilizer were consistent with symptoms caused by a combination of these three phenoxy herbicides. The symptoms I observed from the McLeod and Marsh Photographs, in my opinion, were consistent with symptoms caused by picloram; but, in my opinion, some of the symptoms I observed from the McLeod and Marsh 1984 photographs were consistent with symptoms caused by a combination of dicamba, 2,4-D and picloram, phenoxy herbicides.

S/Benjamin U. Kittrell
BENJAMIN U. KITTRELL

Sworn to and subscribed before me
This 8th day of February, 1992.
S/John L. Martin
NOTARY PUBLIC
My commission expires: 6-20-94

AFFIDAVIT

I, Dr. Benjamin U. Kittrell, being first duly sworn, do depose and say:

1. That I reside at 831 Wedgefield Rd.,Florence, S. C.29501.

2. That I am the resident Director of the Pee Dee Research and Education Center, a division of Clemson University. In that position I am responsible for administering

research and education in the areas of tobacco production. During the period 1978-1987 I was Extension Tobacco Specialist for Clemson University and was responsible for the educational program for tobacco which includes the proper usages of tobacco fertilizer and herbicides in conjunction with tobacco growth and production.

3. That, as an expert in the area of tobacco and agronomy, I have testified in several trials, including the Grace v. Frit trials concerning contaminated fertilizer purchased from W. R. Grace & Co. by North and South Carolina farmers in 1984.

4. That the first I heard about the 1984 problem was a call from a South Carolina extension agent indicating a grower in his county had a problem with his tobacco just like the tobacco in the 1979 Smith-Douglas picloram-contaminated fertlizer, which caused the contaminated tobacco to be taken off the market.

5. That, shortly thereafter, I was told that, according to chemical tests, the chemical contaminant was dicamba.

6. That in 1979 I observed extensive picloram damage to tobacco on farms in South Carolina.

7. That in 1984 I observed extensive herbicide damage to tobacco in South Carolina. Again, I was told that, according to chemical tests, the chemical contaminant was dicamba.

8. That, on 20 September 1991, I was shown **Exhibits A, B and C,** which I was informed were obtained from W. R. Grace & Co. by Waymon Marsh and which show that picloram was a contaminate in the tobacco product samples. **Exhibit C** shows this sample was submitted 13 June 1984 and picloram was reported 2 July 1984. I had not seen these exhibits before 20 September 1991 and Grace did not report these tests to me as they were available.

9. That, as an expert in tobacco and agronomy, I have reviewed data for the farm of Waymon Marsh in Moore County North Carolina for the calendar years 1984 through 1991, which includes photographs, Grace insurance adjusters' notes, attached as **Exhibit D** and leaf count damage reports by Grace adjusters, attached as **Exhibit E.** I also reviewed correspondence from state agencies indicating negative tests for picloram and dicamba on

the Waymon Marsh farm, such as **Exhibit F,** which shows the soil samples are inconclusive. In my opinion all these tests are probably inconclusive, because the picloram symptoms persist in the Marsh tobacco until 1991; therefore, I concur with the opinion of C. Monroe Enzore, Jr., attached hereto as **Exhibit G.**

10. The best test for picloram is in the tobacco plant; and this test applies to the Waymon Marsh farm. This is similar to a bioassay test; and it indicates that picloram persists in the soil around and beneath the Marsh tobacco plants, which still show picloram symptoms in 1991. James Stevens, N. C. Fertilizer Administrator, concurs with this opinion in his testimony at the Grace v. Frit trial as shown in **Exhibit H.** He testified, "Although the plants were showing severe signs, we could not find anything in the soil, in the fertilizer sample I got at that point."

11. In my opinion, the symptoms of damaged tobacco leaf on the Waymon Marsh farm in 1984 and succeeding years to 1991 were caused by picloram. What the adjusters were calling dicamba in 1984 was picloram, which has persisted in the soil beneath the Waymon Marsh tobacco to 1991. My opinion accepts the truth of the statement of Waymon Marsh that he has not used any dicamba, 2, 4-D or picloram on his farm from 1984 to 1991, except insofar as the Grace fertilizer he purchased in 1984 was contaminated with picloram, unknown by him until 1989. Dicamba would not have persisted from July 1984 in the Waymon Marsh farm soil into the years 1985-1991.

12. That in my opinion, as an expert in tobacco and agronomy, the Gold Dollar Grace fertilizer used by Waymon Marsh on his farm in 1984 contained substantial amounts of the herbicide picloram, which is illegal for tobacco fertilizer, and the effects of the picloram were still showing in his tobacco raised in 1991.

13. That it is below the standard of care for a manufacturer to manufacture, produce and sell fertilizer to tobacco growers containing a herbicide such as picloram. In addition these manufacturers of fertilizer and micronutrients knew or should have known that it was foreseeable that a herbicide such as picloram could find its way into their fertilizer and contaminate it, making it unfit for use as a tobacco fertilizer

and harmful to the tobacco and other crops, such as garden vegatables, for which the tobacco fertilizer had been used for years to nuture.

14. That when Monroe Enzore told me his sweet potatoes had symptoms, I told him he should test the fertilizer he had not turned in to Grace for picloram, which he did; and, according to **Exhibit I,** picloram was a contaminate. According to his affidavit he was told by the representatives of W. R. Grace, their adjusters and the North Carolina Department of Agriculture that the only illegal contaminate herbicide in the Grace Gold Dollar fertilizer, which he had used, was dicamba, so he went along thinking that none of their samples tested for picloram, taking their word that dicamba was the only illegal contaminate in the Grace Gold Dollar fertilizer.

s/Benjamin U. Kittrelll

BENJAMIN U. KITTRELL

Sworn to and subscribed before me
this_9th day of_October_, 1991.
S/Sibil S. Warren
NOTARY PUBLIC
My commission expires: April 10, 1995

After 260 pages of grueling examination by both attorneys for defendants , which lasted into a second day, Dr .Kittrell, who had been examined by both law firms in Grace's $12 Million verdict, testified that he still stood fully behind the opinions in the above affidavits, over objection of both attorneys, "Yes, based upon the information that I have documented in these affidavits, I still concur with my opinion." Note, he had been deceived by Grace in testifying as its witness because he was told of only one contaminate-dicamba. " I had not seen these exhibits before 20 September 1991 and Grace did not report these tests to me as they were available."(paragraph 8 above)

The following affidavit of Dr. Brenneman was filed with the Rule 60 motion after the appeal, because it was needed to

point out the errors in the Trial Court Decision. We request an order for an appealable decision on this affidavit.

AFFIDAVIT

1. My name is Lewell D Brenneman. I am a medical doctor and an immunologist, licensed by the State
2. The joint affidavit defense experts Drs Guzelian, James, Sandler, and Smith, are deficient and/or erroneous in their opinions for several reasons:

   2.1 They are not adequately trained or working in the field of immunology or cancer biology. Instead they specialize in toxicology and/or epidemiology and, judging from their voluminous research, they are principally focused on large populations studies with mathematical predictability. Apparently they leave the clinical treatment of individual patients to other physicians.

   2.2 In their discussion on the dose-response relationship, it is clear that these experts are either unaware and/or ignore many well-known areas in immunology, cancer biology, and statistical variation. Therefore, their partial truths give false impressions that every member of a statistical populations is identical to the mean, that there is no distribution around that mean, and that dose-response relationships work just as well for individuals as they do for large populations. They failed to mention the variable distribution of populations or the collapse of the dose-response relationship in individuals. Dr Levin's testimony in the Marsh, McLeod and Speer cases with regard to dose-response is in accord with generally accepted methodology used by immunologists that has been subjected to peer review.

2.3 There are a number of idiosyncratic and other biological mechanisms which are NOT subject to dose-response relationship (1,4); these experts appear unaware them. This is understandable given their principal focus on predictable toxicology and/or epidemiology. They fail to understand that in certain biological systems, a very few molecules are capable of striking a vital cellular target that results in cancer or immune suppression, just as a sharpshooter is more effective with only a single shot than is a machine gun. And eating the calculated bags of fertilizer may enhance the chances of cancer but is hardly a necessity, because there are no "safe" doses for carcinogens, including, but not limited to, the phenoxy herbicides Picloram, Dicamba, and 2,4-D, any more than there are "safe" doses for bullets.

2.4 The joint experts failed to mention that there exists statistical variability in the timing of gene alterations and the sequence of colon cancer development (joint expert's Figure 2), although they imply the contrary. This is also true, for example, for lung and cervical cancer.

2.5 The joint experts failed to mention that in the middle step cancer sequence, the latent assault is highly significant in the production of clinical cancer. For example an old osteoporosis woman, who has predisposing problems, would not be severely injured if she was not in an auto accident.

2.6 The joint experts failed to mention that the Hill criteria, as are many phenomena, are subject to statistical variability and interpretation.

3. In his deposition and affidavits, Alan S Levin, MD, clearly describes the methodology by which medicine is bound both legally and ethically to utilized, such as the history, physical examination, and laboratory studies. Dr Levin's methodology, as expressed in his affidavits and deposition, which I have reviewed for the Marsh, Speer and McLeod cases, is generally accepted among immunologists and has been subjected to peer review. This description

would be clear to a practicing physician who is conversant with immunology and biological regulatory mechanisms. These Joint Affidavit Doctors are not in the same field of medicine - Immunology; therefore, their opinion as to Dr Levin's methodology are not valid.

4. Dr Levin's description of the cause of cancer is a well-accepted fact, specifically, that cancer is allowed to arise at times when the immune system is suppressed. Therefore, the immune suppressive effects of picloram and/or Dicamba and 2,4-D are a major factor in the causation of cancer (3,4,5,6).
5. Similar to other phenomena, the Hill criteria are governed by the laws of statistics which render These criteria highly variable, especially among individuals.
6. It is incomprehensible that professors at highly respected universities would "conveniently" ignore "inconvenient" evidence. It is unconscionable that they omitted mention of basic statistical parameters such as (a) the distribution around the mean, which results in errors of means of variability and (b) population size, which results in greater errors. Such omissions imply that these parameters are without variability and error, which is untrue. In addition, authoritative medical textbooks describe a number of biological mechanisms that do not conform to the dose-response theory or to other Hill criteria of toxicology (1,2,4). Therefore in view of these errors, the opinions of these experts must be rejected and replaced with those which take into account the entire body of evidence in this case.
7. Based upon my training, education, experience, and the medical literature, it is my opinion to a reasonable degree of medical certainty that the opinions of Dr Levin, after reviewing his deposition and affidavits on picloram, 2,4-dichloropheoxyacetic acid, and dicamba in the Marsh, Speer and McLeod cases are valid opinions, based on facts and data reasonable relied on by immunologists, with which I agree and, in my opinion as an immunologist, will

assist the Jury in understanding the evidence and determining the facts in issue, and are based on factors which comply with the Daubert requirements.

8. After reviewing the judgment of Judge Tilley and I would point out several errors.

8.1 It has been shown that picloram is carcinogenic in animals and the IARC considers it to be a possible human carcinogen. This satisfies the bioplausibility prong the Daubert analysis.

8.2 The medical/scientific community generally accepts that human cancer is caused, in part by the interaction of an endogenous proto-oncogene/oncogene and a carcinogen. This satisfies the general acceptance prong of the Daubert analysis.

8.3 On page 5, the Judgment implies that the medical/scientific community does not accept the concept that all human disease is a function of the host's reaction to an etiologic agent. This could be no farther from the truth. It is generally accepted that three different persons could receive the exact same dose of the exact same agent and develop three different diseases as a result of this exposure. Three people could receive the exact same dose of HIV virus from the exact same donor and one will develop Kaposi's sarcoma, another pneumocystis pneumonia, and the third a B cell lymphoma. Three people could receive the exact same dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens are similar to gunshots- the same gun may damage different parts of different people. Judge Tilley is apparently unaware of these factors.

8.4 The fact that all three individuals developed cancers which are associated with picloram after they were chronically exposed to picloram is unlikely to be coincidental. That is, it is more likely than not that the picloram to which these individual were exposed is a

cause or a substantial contributor to each of their cancers. This opinion is reached after using generally accepted medical and scientific methods which have been subjected to peer review.

8.5 On page 6, the Judgment implies that the a given carcinogen must cause a specific type of cancer. This is not true. Three people could receive the exact same dose of HIV virus from the exact same donor and one will develop Kaposi's sarcoma, another pneumocystis pneumonia, and the third a B cell lymphoma. Three people could receive the exact same dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens, including but not limited to the phenoxy herbicides, Picloram, Dicamba and 2,4-D, are similar to gunshots- the same gun may damage different parts of different people. On the other hand asbestos most often causes only one type of cancer, lung cancer.

Medical Literature References

1. Goodman & Gilman's the pharmacological basis of therapeutics, 9th ed. Joel G. Hardman, Lee E. Limbird et al, 1996. page 67
2. Ibid, page 1087
3. Harrison's Principles of Internal Medicine by Isselbacher, et al, 13th ed 1995, Ch 390 Sec 5
4. ibid, Ch 277 Sec 1
5. Adams et al, Vet Hum Toxicol, 1991, 33(3):209
6. Balkely BR, Vet Hum Toxicol, 1997, 39(4):204

"I, Alan S. Levin, M.D., being a practicing physician for over 3 decades, being a world renown expert in cancer, being certified by the American Board of Allergy & Immunology and the American Board of Pathology, being on the faculty of the University of California in San Francisco for over 20 years, being a member of the Medical Board of the State of California using widely accepted basic scientific reasoning have come to the

opinion, based upon my experience, my training, and my review of the peer reviewed medical literature, that the tainted fertilizer in question did cause the diseases at issue. This is relevant testimony from a qualified expert witness. In the absence of a credible defense, this opinion would cause a reasonable juror to return a verdict in favor of the plaintiff. Based upon these facts, summary adjudication should not be issued and this case should go to trial in front of a jury of the plaintiff's peers."

It is clear that the Daubert factors should not really be in dispute.

REASONS FOR GRANTING THE WRIT

We submit the Court of Appeals for the Fourth Circuit violated the principles of **Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S.579,113S.Ct.2786, 125 L.Ed.2d 469 (1993)**...in upholding the trial Court's denial of a jury trial for three cancer victims (two died) by allowing summary judgment for two defendants, who bragged about suppressing "the potentially damaging circumstances around the tobacco situation" and who deceived the N. C, Commissioner of Agriculture, 1800 tobacco farmers, the people of North Carolina with false full page newspaper ads, and their own witnesses, who were sequestered from hearing the testimony of each other in a re-trial which resulted in one defendant obtaining a judgment against the other for $12 Million?

We submit this court order a ruling on Plaintiffs' Rule 60 Motion, filed about 3 years ago, with the affidavit of Dr. Lewell D. Brenneman, because the Trial Court ruled inadmissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin, (whose testimony was **ruled admissible by a First Circuit Trial Judge**) without considering any testimony from another immunologist specialist and without giving Plaintiffs an opportunity to present evidence from another immunologist specialist, Dr. Lewell D.

Brenneman, who testifies by affidavit, below: "Dr Levin's methodology, as expressed in his affidavits and deposition, which I have reviewed for the Marsh, Speer and McLeod cases, is generally accepted among immunologists and has been subjected to peer review. This description would be clear to a practicing physician who is conversant with immunology and biological regulatory mechanisms."

We submit thereis a **conflict** in the trial courts of the First and Fourth Circuits in the recognition of Dr. Levin, an immunologist medical experts; and is there a conflict in the trial courts of the United States for the Middle and Eastern Districts of North Carolina. Grace was granted a New Trial so it could prove 2-4D in its fertilizer; yet these Plaintiffs', after they forced Grace to produce photographs of their 1984 tobacco and submitted them for Dr. Kittrell's Deposition, below, were not allowed to have 2-4D considered as a contaminate by the court or Dr. Levin. (Dr. Levin's testimony was allowed by the court in a case which prompted EPA hearings in the Woburn contamination, which required Defendant, W. R. Grace, to pay approximately $69 Million Dollars to clean up the Woburn chemical contamination. This was the subject of the case before U.S. District Judge Skinner,who ruled admissible the testimony of Plaintiffs' immunologist specialist, Dr. Alan S. Levin.)(Dr. Levin's testimony was **ruled admissible by this First Circuit Trial Judge** long before the EPA cleanup and together with an undaunted trial lawyer inspired the movie, "A Civil Action.")

Did the trial court err and contribute to problems in these cases by refusing to consolidate Speer and McLeod with Marsh, and entering a Pretrial Scheduling Order only for Marsh, therefore, leaving counsel and clients to expect a separate Pretrial Scheduling Order for Speer and McLeod with time thereafter for discovery, amendments, motions etc., which was not entered as provided in Rule of Civil Procedure (16b)?

The Court of Appeals, on page 8, alludes to an "...independent conclusion that picloram causes cancer." By Dr. Levin. We submit this is error because the peer review, MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOLY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Exposure to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article list 2-4D and Picloram as phenoxy acids, refutes the court's statement.

Additionally, the Court of Appeals states: "Neither the National Toxicology Program nor the Environmental Protection Agency have listed picloram as a carcinogen." We submit this is not controlling because the peer review, **Journal of the American Medical Association: "However, quantitative risk assessments used by regulatory agencies to assess risks in populations are not applicable to risks in individuals." Levin Deposition 321, 593,(JA 1557, 1830) Exhibit 16.(Speer Appendix 10) see also Waymon Marsh Affidavit for EPA Advisories, stating their studies are inadequate as to cancer(Marsh Appendix 2)(JA1007-1024)** , refutes the court's reliance on this statement.

It is noted that only after the trial lawyer and Dr. Levin presented his testimony to Judge Skinner in the Woburn case did EPA step in and require W. R. Grace to pay for a $69 Million Dollar cleanup.

Another Grace witness testified in the second trial to these facts:

McNair-1-10,000 parts

3. Dr. McNair testifies one phenoxy sample in parts per billion: "THAT WOULD BE ONE TO TEN THOUSAND PARTS PER BILLION, EXTREMELY LARGE CONCENTRATION

BASED ON THIS SORT OF SAMPLE WE HAVE BEEN LOOKING AT BEFORE." (Tp. 25)

4. Dr. McNair describes a dirty sample with several major peaks off scale. He confirms 2,4D, which was a phenoxy found at the Frit plant site and in its micronutrient mix. (Tp. 695)

We submit that Grace hid this evidence, because they knew this amount of any of the illegal ingredients (Dr. McNair also confirmed picloram as an illegal contaminant) was extremely deadly since it was about 5 times that found in the 1979 Smith-Douglas case, which took all the tobacco off the market. Yet Grace and these defendants conspired to suppress this evidence during the growing season at a high risk to these farmers and probably those who smoked the 1984 tobacco. Grace's full page newspaper ads stated there were only trace accounts of dicamba and told the farmers it was safe to raise the tobacco and eat from gardens fertilized with their Gold Dollar fertilizer.

Just like the Ford Pinto case defendants played the odds in "suppressing the potential damaging circumstances". Our case could not have been proved but for the Grace low verdict of $2 Million Dollars, which was set aside, so Grace could mend its lick and prove all these other illegal ingredients and the large amounts in some samples in order to prove what they had actually paid in 1984 for 1800 farms-$12 Million Dollars-without taking all the tobacco off the market. In 1979 Smith-Douglas paid $20 Million Dollars for 1200 farms after taking the tobacco off the market. Dr. McNair's sample was 5 times more deadly for the 1984 contamination. But the tobacco companies could take the hit and no one would have known about the risk, except for the necessity for Grace's second trial, because they only proved trace amounts of harmless dicamba in the first trial, which proved to be a lie in the second trial.

Ambrosini v. Labarraque, 101 F.3d 129 (C.A.D.C. 1996), we contend correctly applies Daubert: "Even if the burden placed on the "gatekeeper" may seem heavy at times, *see, e.g., Daubert*, 509 U.S. at 600-01, 113 S.Ct. at 2800 (Rehnquist, C. J., concurring in

part and dissenting in part), there is nothing in *Daubert* to suggest that judges become scientific experts, much less evaluators of the persuasiveness of an expert's conclusion. Ambrosini v. Labarraque, 101 F.3d 129, 134 (C.A.D.C. 1996)

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Judgment of the Trial Court should be reversed with instructions to reopen Discovery for Plaintiffs to prove 2-4D and any other "illegal ingredient prohibited by law"(as alleged in the complaint and clearly known by defendants) in the Grace Gold Dollar fertilizer, and admit the testimony of Dr. Levin.

Hopefully this case will be re-opened and allowed to go to the jury. These are other evidence and matters for consideration:

Our case can be distinguished from smoker-lung cancer cases since Mr. Marsh suffered from an undifferentiated large cell tumor while smokers generally suffer from small cell cancer. Mr. Marsh's tumor is rare in older cigarette smokers.

"The majority of lung cancers can be categorized into four histologic types. Squamous cell carcinoma, small-cell undifferentiated carcinoma, large-cell undifferentiated carcinoma, and adenocarcinoma 31 . There is a well established direct correlation between the dose of cigarette smoke and the first two types of cancer. The type of cancer that Mr. Marsh suffered (undifferentiated large cell) is not correlated with the dose of cigarette smoke. It's incidence is actually inversely related to the dose of cigarette smoke and is not common in people over 60.

The Opinion and Judgment imply that the medical/scientific community does not accept the concept that all human disease is a function of the host's reaction to an etiologic agent. This is erroneous. It is generally accepted that different persons could receive a dose of the exact same agent and develop different diseases as a result of this exposure. Three people could receive a dose of HIV virus

from the exact same donor and each could develop a different disease. Three people could receive a dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens are similar to gunshots- the same gun may damage different parts of different people. The Trial Judge was apparently unaware of these factors. (JA 1074-1161,2115-2118)

The fact that all three individuals developed cancers which are associated with picloram after they were chronically exposed to picloram, and/or 2,4D, and/or dicamba is unlikely to be coincidental. That is, it is more likely than not that the picloram, and/or 2,4D, and/or dicamba to which these individuals were exposed is a cause or a substantial contributor to each of their cancers. This opinion is reached after using generally accepted medical and scientific methods which have been subjected to peer review.(JA 1074-1161, 2115-2118)

The Opinion and Judgment imply that a given carcinogen must cause a specific type of cancer. We respectfully contend this is erroneous. Three people could receive a HIV virus from the exact same donor and die from different diseases. Three people could receive the exact same dose of a carcinogen and develop three different cancers. One could develop lung cancer, the other cervical cancer and the third colon cancer. Carcinogens, including but not limited to the phenoxy herbicides, Picloram, Dicamba and 2,4-D, are similar to gunshots- the same gun may damage different parts of different people. On the other hand asbestos most often causes only one type of cancer, lung cancer.(JA 1074-1161, 2115-2118)(See also, JA 1956-2156)

Dr. Levin's opinions were not accepted by the Trial Court as valid. But Peer review articles, as well as Dr. Levin, state that immunologists consider Dr. Levin's affidavit and deposition opinions to be **valid**. The peer review article on **Molecular Epidemiology and the Genetics of Environmental Cancer** supports Dr. Levin's affidavit and deposition opinions as **valid**

and suggests that classic epidemiologic techniques are out of step "to the assessment of risk in individuals." Surely Admiral Zumwalt, who lost his son to cancer from the agent orange he ordered in Vietnam, would have been better served with a Dr. Levin advising him on the use of agent orange on the Battlefields of Vietnam. If he could have prevented this debacle, he could have added, if appropriate, the Medal of Honor to Dr. Levin's Silver Star and Bronze Star for Valor he was awarded for heroism in Vietnam. U.S. District Judge Skinner did have this American Hero on the Battlefields of Pollution advising the Court in the Woburn case, which has provided the inspiration for the movie, "A Civil Action."

How much Super Fund money-how many lives-could have been saved if pollution greed had not taken over? We request the Court to take Judicial Notice of the Agent Orange Hearings before Congress and the EPA hearings in the Woburn contamination, which required Defendant, W. R. Grace, to pay approximately $69 Million Dollars to clean up the Woburn chemical contamination, which was the subject of the case before U.S. District Judge Skinner.

Additionally, consider that Fritt, as well as Grace, did not want any more EPA problems. Supporting documents show:

PSD-27 Documents of Frit EPA problems

PSD-28 Documents to further show Frit actions

PSD-28A Baldwin testimony proving 2 phenoxy chemicals-2,4-Dand 245T SILVEX were on the Frit Walnut Ridge property, where the micronutrient mix was manufactured.

28B Environmental violations by Frit which "...pose a serious threat to human health and the environment."

28C Memo of Frit-Grace meeting discussing how Grace "...had supressed the potentially damaging circumstances around the tobacco situation."

This give some explanation for why Plaintiffs we not allowed to inspect the Fritt plant.

There was another peer review article for canines: "CASE-CONTRO STUDY OF CANINE MALIGNANT LYMPHOMA

POSITIVE ASSOCIATION WITH DOG OWNER'S USE OF 2-4D HERBICIDES" TARONE-CANTOR-JESSEN-RICHARDSON. Tordon is a herbicide, containing Picloram and 2-4D, used to control weeds in lawns.

Grace, for Frit, had expressly warranted that **dicamba, the only contaminant, would be gone in 60-90 days and that it was safe (there were only trace amounts) for farmers to eat from their gardens to which the contaminated fertilizer had been applied.** This was a fraudulent warranty, which Grace perpetuated by letter, newspaper ad (JA 964- 965) and adjusters because on 2 July 1984, prior to the letter and ad, Grace had a test (JA 966) which proved picloram; and another witness, Dr. McNair (who Plaintiff has identified as a Grace trial witness it intends to call-Defendants, not Plaintiff, had the names, addresses and telephone numbers) testified that there was more than trace amounts of the phenoxy, **"That would be one to ten thousand parts per billion. Extremely large concentration based on this sort of sample we have been looking at before." (JA 967).**

Plaintiff, under the original complaint has the right to prove either **picloram** or **2,4-D** or any other contaminant was an additional contaminate or additional contaminants, because either proof would prove Defendants were responsible for a **breach of express warranty or false representation or a misrepresentation.**

Plaintiff, under the original complaint has the right to prove that the contaminant or contaminants did **not** dissipate in 60-90 days and that it was **not** safe to eat from gardens and work in tobacco fertilized with this contaminated Gold $ fertilizer, because either proof would prove Defendants were responsible for a **false representation or a misrepresentation**. Had this false representation not been made Grace would have paid the farmers $60M rather than $6M. (JA 928) Also refer to JA 518 for another reason for the false representations.

Plaintiff, under the original complaint has the right to prove under paragraph 17 "compensatory damages in excess of $10,000." This includes damages from one or more phoenixes

because: 1)the **only** contaminant in the Gold $ fertilizer was **not just dicamba**, and 2)it did **not** dissipate in 60-90 days and it was not safe to eat from gardens and work in tobacco fertilized with this contaminated Gold $ fertilizer.

Defendants also referred to the contaminant as only trace amounts of dicamba and encouraged farmers "to continue your normal cultivation and harvest...practices," which according to Dr. McNair is false.

Since Defendants' misrepresentation is also an express warranty, GS 106-662(e)(4) does not apply. "Even if the provisions of section 106-662(e)(4) were deemed to apply, the Department of Agriculture has certified that W. R. Grace fertilizer containing micronutrient mix used ingredients prohibited by the provisions of the article," according to the Fertilizer Administrator's affidavit. **(JA 1017).** Dr. Kittrell identified the photos (JA 974) to show symptoms of three phoenixes-picloram, dicamba and 2,4 D.

Plaintiff, however, out of an abundance of caution, included an allegation to cover the multiple contaminants point in the proposed amendment. Plaintiff had already alleged two phoenixes-dicamba and picloram. Note, on page 2 of **(JA 894-901, 895)** picloram is named as a phenoxy. This and companion cases involve death by false warranty. It is manifestly unfair to attempt to exclude evidence which Defendants have had full knowledge of since 1984. At the Grace v. Frit second trial two exhibits were utilized for showing the contamination. (JA 969 and 970) **(Exhibit 10)** Neither mentioned 2,4D. Grace in the first trial was not allowed to prove 2,4D; but did secure a $1 Million verdict for breach of warranty. The Judge realized the confusion on the part of the jury. He set aside this verdict, allowed evidence of 2,4D at the second trial; and a $12 Million verdict was rendered. If the persuasion and resources of W. R. Grace can obtain a new trial, certainly this Plaintiff is entitled to present the same evidence.

The significance of 2,4-D was buried in the Grace v. Frit trials. The first case went to the jury without certain evidence about 2,4-D; but the Trial Judge reversed himself

and allowed the evidence almost a year later in the second trial. Certainly this Plaintiff should be treated as fairly as Grace was when it was a Plaintiff. Plaintiff requests the Court to consider the entire opinion in Foman v. Davis, supra. Counsel has been laboring under a serious health condition(subsequently had open heart surgery). The Supreme Court refers to the spirit of the federal rules for decisions on the merits and not on the skill of counsel capitalizing on a decisive misstep by counsel.

****

PLAINTIFF SUPPORTING DOCUMENTS

PSD-1 Transcript filed in McLeod v. Grace, 3:9100047

PSD-2 Order-Judge Cornelius denying Motion to Dismiss, Brief and Order allowing Frit to substitute attorneys.

PSD-3 Speer Deposition in which he shows a coverup with all Defendants working together.

EXCERPTS OF TRANSCRIPT

PSD-4 Dr. Robert McKinney-Grace employee-shows picloram is overwhelming contaminate.

PSD-5 Harold Monroe McNair describes major peak for picloram and something worse.

PSD-6 Harold Coble says picloram is contaminate because he says not enough dicamba or 2-4-d to affect tobacco.

PSD-7 Dr. Ben Kittrell said first report was picloram.

PSD-8 Dave Wesley Benfield-Frit employee-was warned by Grace that Frit was suspect for causing contamination.

PSD-9 Frank M. Dabney, Jr. says no Frit samples ever tested.

PSD-10 Glenn Cason says Frit scrap filler is everything mixed up so we can't sell it, from one batch to another do not really know what it is.

PSD-11 Mr. Maready sums up, "It makes it pretty obvious that Brian Rogers is right when he tells you that what I thought I was looking at was picloram. Because it shows up in everything which follows."

PSD-12 Affidavit of tobacco expert, C. Monroe Enzor, Jr., who states in his opinion Waymon Marsh Gold Dollar fertilizer contained picloram, and effects were still showing in his tobacco raised in 1990. Now 1991.

PSD Dr. Levin Deposition-cancer caused by picloram exposure and continued exposure caused by Defendants fraudulent concealment is a contributing factor.

PSD-14 Fertilizer Administrator-Grace Gold Dollar Fertilizer contains ingredients prohibited by law.

PSD-15 N. C. Supreme Court Decision discussing the worthlessness of the Grace Gold Dollar Fertilizer.

PSD-16 7-2-84 Grace Test reporting picloram.

PSD-17 7-24-84 Dicamba ad not reporting picloram to public.

PSD-18 Jesneck deposition proving picloram in Enzor fertilizer.

PSD-19 Dr. Kittrell, tobacco expert and witness at Grace v. Frit trial who confirms picloram on the Marsh and McLeod Farm, where the decedents were exposed to picloram and other phenoxies. Two affidavits together with videos and photos.

EXCERPTS OF TRANSCRIPT

PSD-20 Frit Plant Chemist, Roscoe McNutt, Jr. testifies Frit samples, by company policy, were retained for one year. Tp 905-912.

PSD-21 Vice-Pres. Carl Schauble admits Grace samples were not retained one year as required by company policy and procedure, which had been followed by Plant Chemist. Tp 1385, 1409-1415.

PSD-22 Vice-Pres. David Wesley Benfield admits meeting with Grace representatives, discussing the contamination as it relates to Frit micronutrient mix and then discussing it with Vice-Pres. Schauble. Tp 897-905.

PSD-23 U. S. Judge consideration of Dr. Levin's affidavit.

PSD-24 Memo to Judge Tilley-Rowan case-Concert of Action

PSD-25 Grace Memo on fertilizer statute.

PSD-26 Sinclair farms file-paid for other crops

PSD-27 Documents of Frit EPA problems

PSD-28 Documents to further show Frit actions

PSD-28A Baldwin testimony proving 2 phenoxy chemicals-2,4-D and 245T SILVEX were on the Frit Walnut Ridge property, where the micronutrient mix was manufactured.

28B Environmental violations by Frit which "...pose a serious threat to human health and the environment."

28C Memo of Frit-Grace meeting discussing how Grace "...had supressed the potentially damaging circumstances around the tobacco situation."

28D Grace trial Exhibit 11-A, which proves Frit micronutrient mix used in Gold Dollar fertilizer to which Plaintiff's husband was exposed contained three phenoxy chemicals, which Dr. Kittrell says were on the Marsh farm according to the tobacco symptoms-the same evidence admitted in the Grace v. Frit trial.

PSD-29 Misleading Frit statement about retention of samples.

PSD-30 Persistence of picloram and 2,4 D, test and run off.

PSD-31 Jury verdict in second Grace v. Frit trial and order and issues setting aside jury verdict in first trial.

PSD-32 Peedin memos and letters confirming Kittrell opinion of persistence of phenoxy chemical on the Marsh farm after 1984.

PSD-33 Grace memorandum-evidence of 2,4 D at Frit plant is admissible.

Respectfully submitted,

JOHN RANDOLPH INGRAM
618 Sunset Avenue - Suite 100
Asheboro, NC 27203
Telephone: (843) 455-3301
Petitioners' Counsel of Record

No._____

In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

JOHN RANDOLPH INGRAM
618 Sunset Avenue - Suite 100
Asheboro, NC 27203
(843) 455-3301
Petitioners' Counsel of Record

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals, (4th Cir. 2003) A-1

Order on Rehearing (4th Cir. 2003)..... A-12

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

HALIA S. MARSH, Executrix of the estate of Robert Sidney Marsh,
Plaintiff-Appellant,

v.

W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY,
Defendants-Appellees.

No. 98-1943

THEODORE C. MCLEOD,
Plaintiff-Appellant,

v.

W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY,
Defendants-Appellees.

No. 98-1944

THOMAS R. SPEER,
Plaintiff-Appellant,

v.

W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY,
Defendants-Appellees.

No. 98-1945

Appeals from the United States District Court
for the Middle District of North Carolina, at Rockingham.
N. Carlton Tilley, Jr., Chief District Judge.
(CA-90-613-3, CA-91-47-3, CA-91-48-3)

Argued: January 25, 2000

Decided: November 19, 2003

Before WIDENER, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished opinion. Judge Widener wrote the opinion, in which Judge Luttig and Judge Michael concurred.

COUNSEL

ARGUED: John Randolph Ingram, Asheboro, North Carolina, for Appellants. Jonathan A. Berkelhammer, SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellee Frit Industries; B. Gordon Watkins, III, KILPATRICK STOCKTON, L.L.P., Winston-Salem, North Carolina, for Appellees W.R. Grace and Continental Casualty. **ON BRIEF:** James D. Cowan, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellee Frit Industries; Steve M. Pharr, KILPATRICK STOCKTON, L.L.P., Winston-Salem, North Carolina, for Appellees W.R. Grace and Continental Casualty.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

WIDENER, Circuit Judge:

Plaintiffs Halia S. Marsh, executrix of the estate of Robert Sidney Marsh, Thomas R. Speer, and Theodore McLeod, executor of the estate of Beulah M. McLeod, appeal from the district court's decision granting summary judgment to defendants W.R. Grace & Co. (Grace), Frit Industries, Inc. (Frit), and Continental Casualty Company. *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613 (M.D.N.C. May 26, 1998). Plaintiffs brought a product liability action against the defendants stemming from their use of fertilizer contaminated with the chemical picloram. They alleged that the picloram caused Marsh, Speer, and Mrs. McLeod to develop cancer. The plaintiffs had one expert, Dr. Scott Levin, who testified that the contaminated fertilizer caused the plaintiffs' cancers. The district court found that Dr. Levin's testimony did not satisfy the admissibility requirements for expert testimony required by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and consequently, granted the defendants' motions for summary judgment because the plaintiffs provided no additional evidence that the picloram caused their injuries. Plaintiffs appeal from that decision and from the district court's denial of the motions of Mrs. Moore and Speer to amend their complaints to include chemicals other than picloram as the cause of their injuries. *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613 (M.D.N.C. Oct. 13, 1992); *Speer v. W.R. Grace & Co.*, No. 3:91CV00048 (M.D.N.C. Dec. 9, 1994). For the reasons set forth below, we affirm the decisions of the district court.

I.

The underlying facts of this case are not complicated and largely not in dispute. Because we are reviewing disposition of this case on summary judgment, we examine the facts as found by the district court after it construed the case in the light most favorable to the plaintiffs. *Beall v. Abbott Lab.*, 130 F.3d 614, 618-19 (4th Cir. 1997). In 1984, Grace manufactured and sold Gold Dollar tobacco fertilizer using a micronutrient mix provided by Frit which included picloram. All of the plaintiffs are North Carolina farmers — Marsh and Speer worked on Marsh's son's, Waymon Marsh's, farm, and the McLeods

worked on their own farm. The plaintiffs purchased and used, either or both, Grace's Gold Dollar fertilizer on tobacco crops and on vegetable gardens. Each of the plaintiffs subsequently discovered that the Gold Dollar fertilizer contained several ingredients it should not have, including picloram, a broadleaf herbicide. For several years, the plaintiffs were exposed to the picloram while handling the fertilizer itself, from contact with soil and water contaminated by picloram from the fertilizer, by eating vegetables from gardens contaminated by the fertilizer, and from eating fish from a pond contaminated by fertilizer run-off.

Between 1984 and 1988, all of the plaintiffs suffered from some type of cancer. Marsh was diagnosed with lung cancer in October 1988, and he died two weeks later at the age of 78. Speer discovered he had colorectal cancer in March 1988 at the age of 65, but he received successful treatments for the disease. Mrs. McLeod was diagnosed with cervical cancer in August 1986. She died from the disease two years later at the age of 74.

In 1990, each of the plaintiffs filed their suits against Frit, Grace, and Continental Casualty Company in North Carolina state court. All three complaints alleged that the defendants failed to warn the plaintiffs of the contaminated fertilizer, made false representations concerning the contaminants in the fertilizer, negligently manufactured the fertilizer, breached their express and implied warranties, and participated in unfair settlement practices. The plaintiffs all claimed damages incurred as a result of their respective cancers, which they alleged were proximately caused by the picloram in the fertilizer.

The defendants removed all three cases to federal court in December 1990. The parties then engaged in extensive discovery, including an exhaustive deposition of the plaintiffs' expert witness, Dr. Levin. On October 28, 1991, the defendants moved for summary judgment in the Marsh case. In March 1992, Mrs. Marsh made a motion pursuant to Federal Rule of Civil Procedure 15(a) to amend her complaint to include chemicals other than picloram, specifically 2,4-D. The court declined her motion on the basis that she had unduly delayed making the motion and that the defendants would be unfairly prejudiced if it was granted. In October 1994, soon after the close of discovery, Speer made a motion to amend his complaint under Rule

15(a) that was essentially identical to the one Mrs. Marsh had previously made. In November 1994, the defendants filed motions for summary judgment in the Speer and McLeod cases. The court denied Speer's motion to amend his complaint citing the same reasons it denied Mrs. Marsh's motion in addition to the fact that the parties had again reached summary judgment stage in the proceedings. On May 26, 1998, after reviewing the defendants' motions for summary judgment in all three cases, the district court found that Dr. Levin's testimony that picloram caused the plaintiffs' cancers did not meet the requirements for admissibility of expert testimony set forth in *Daubert*. *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613, slip op. at 12 (M.D.N.C. May 26, 1998). Without Dr. Levin's testimony, the district court found that there was no genuine issue of material fact with respect to proximate causation and granted the defendants' motions for summary judgment. *Marsh*, No. 3:90CV00613, slip op. at 3-5. The plaintiffs now appeal the district court's exclusion of Dr. Levin's testimony and denial of their requests to amend their complaints.

II.

A.

We review a district court's decision granting a motion for summary judgment *de novo*. *Metropolitan Life v. Pettit*, 164 F.3d 857, 860 (4th Cir. 1998). The district court's decision on the motion for summary judgment in this case turned on the exclusion of expert testimony under *Daubert*. We review a district court's decision to exclude expert testimony for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997). We first address the plaintiff's contention that the district court erroneously excluded Dr. Levin's testimony and, second, the court's subsequent decision to grant summary judgment for the defendants.

In *Daubert*, the Supreme Court set forth the two-part inquiry a district court must engage in when determining whether to admit expert testimony. The district court must exercise a gatekeeping function in which it only admits expert testimony that is both reliable and relevant. *Daubert*, 509 U.S. at 589. We are only concerned with the reliability prong of the test in this case because the evidence was relevant to the causation element of the plaintiffs' case.

The *Daubert* analysis is a flexible one, *Daubert*, 509 U.S. at 592-93, 594-95, and, to aid courts engaging in the reliability analysis, the Court provided four non-exclusive factors that the district court could consider when evaluating proposed expert testimony: (1) whether the evidence can be tested, (2) whether the theory has been subjected to peer review or publication, (3) the known or potential rate of error of the technique, and (4) whether the relevant scientific community has generally accepted the theory. *Daubert*, 509 U.S. at 593-94. The focus of the district court's inquiry should be the principles and methodology of the expert, not the conclusions reached. *Daubert*, 509 U.S. at 595. The overall goal of the *Daubert* analysis is to ensure that "an expert, whether basing his testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The Court instructs us to provide district courts with "broad latitude," p.142, or "considerable leeway," p.156, both as to the method used to decide whether to admit expert testimony and to the decision whether to admit or exclude the testimony. *Kuhmo Tire*, 526 U.S. pp.142, 156. Under the abuse of discretion standard, we examine the record and the rationale of the district court and reverse its decision only if it made a clear error in judgment. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). We are of opinion that the record supports the district court's analysis and decision to exclude Dr. Levin's testimony.

Our review of the district court's opinion discloses that the court found Dr. Levin's methods and logical processes used to reach his opinion on causation were unreliable. Dr. Levin is a medical doctor specializing in pathology, immunology, and cancer who has researched and written about cancer. In determining the cause of his patients' cancers, Dr. Levin relies on his evaluation of individual responses to a given intrusive agent. His theory is that all disease is a function of the host, not of the etiologic agent. So, if the body is set up for cancer, then the etiologic agent can cause cancer. Dr. Levin does not focus on epidemiological studies, which indicate percentages of cancer occurrences from particular causes in designated populations to aid scientists in determining whether a specific agent can cause cancer. We have held that that epidemiological evidence is not

necessarily required for a valid expert opinion on causation so long as the expert's methods are otherwise sound. *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995). However, the district court, in the case at hand, engaged in a lengthy analysis of Dr. Levin's methods using each of *Daubert*'s four suggested factors and found that Dr. Levin's methods were not reliable.

Daubert first suggests that we should evaluate whether an expert's opinion is subject to testing. *Daubert*, 509 U.S. at 593. The district court found that Dr. Levin's testimony was not subject to testing because he started from the conclusion that picloram caused the plaintiffs' cancers and then generated, without testing, the hypotheses to support that conclusion. *Marsh v. W.R. Grace & Co.*, No. 3:90V00613, slip op. at 7 (M.D.N.C. May 26, 1998). The record supports the district court's decision that Dr. Levin's opinion is unreliable because it cannot be tested or verified consistently, and therefore, the court did not abuse its discretion.

Dr. Levin used the results of only one laboratory test performed on two of the plaintiffs to reach his opinion on causation. This test, however, did not identify the agent that caused the plaintiffs' cancers. Dr. Levin provided no other medical tests to verify his hypothesis that picloram caused the plaintiffs' cancers. We conclude that the district court did not abuse its discretion when it found that Dr. Levin needed more verification for his opinion because the defendants proposed several alternative causes for the plaintiff's cancers. The defendants presented evidence that showed the plaintiffs had been exposed to a multitude of chemicals that could cause cancer during their lifetimes, that one plaintiff had a family history of the type of cancer he contracted, and that another contracted lung cancer after a 50-year history of smoking. Dr. Levin, however, failed to verify or provide a means to verify his conclusion by ruling out any alternative causes for the plaintiffs' cancers. While an expert need not rule out all alternative causes to provide a valid opinion, he must at least explain why his opinion remains sound in light of alternative causes proposed by the other parties. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265-66 (4th Cir. 1999). This record supports the district court's finding that he did not do so adequately.

The district court also found that Dr. Levin's testimony failed the second *Daubert* factor because his theories underlying his conclusion

had not been subject to pee review or publication. *Marsh*, No. 3:90V00613, slip op. at 10. While we acknowledge that the *Daubert* analysis must be flexible and that not all medical experts' theories and methods will need to be published or peer reviewed, this is a valid consideration in considering the facts of a particular case. Dr. Levin's determination that picloram is a carcinogen is inapposite to much of the scientific literature on the subject. Neither the National Toxicology Program nor the Environmental Protection Agency have listed picloram as a carcinogen. To support his conclusion that picloram is a carcinogen, Dr. Levin stated that he read abstracts of several articles and looked at other studies. But in the face of literature and findings contradictory to Dr. Levin's determination, the district court did not abuse its discretion in finding that Dr. Levin needed further support for his independent conclusion that picloram causes cancer.

The district court noted that *Daubert*'s third factor, the potential rate of error of a technique, is not directly applicable to Dr. Levin's testimony because his technique is not susceptible to a measurable rate of error. However, we find that the district court did not abuse its discretion in deciding that Dr. Levin's failure to identify a no-effect level for picloram, and his untested assumptions with respect to the amounts of pecloram to which plaintiffs were exposed, introduce an unacceptable potential for error into his opinion that the amount of picloram to which plaintiffs were exposed caused their cancers. While Dr. Levin agreed that picloram had a no-effect level, he did not state what it was or whether the amounts plaintiffs were exposed to exceeded that level. Apparently he assumed that the plaintiffs' exposure to the chemical was about three years, and he assumed the plaintiffs had received adequate exposure to picloram to cause cancer. We find that the record supports the district court's decision that this means of analysis by assumption could lead to an unacceptable potential for error.

After reviewing Dr. Levin's affidavits and deposition testimony, we find sufficient support for the district court's determination that Dr. Levin's methods are not generally accepted by the medical community, the final *Daubert* factor. While plaintiffs argue that Dr. Levin relies on a methodology used by other immunologists and cite a portion of an article in the Journal of the American Medical Association in support of that contention, the article only supports Dr. Levin's

proposition that population studies are not determinative. While potentially true, the district court, supported by the record, found that Dr. Levin did not demonstrate that his methods used in this case are also used by experts in his field. Additionally, the record supports the district court's conclusion that Dr. Levin's opinion that picloram is a carcinogen is not generally accepted in the scientific community for essentially the same reasons we noted that this conclusion needed support either in scientific testing or through validation by peer review or publication.

B.

We grant a party's motion for summary judgment under Rule 56(c) only if the case presents no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The only evidence the plaintiffs provided indicating that the picloram in Grace's fertilizer caused their cancers was the expert testimony of Dr. Levin. Without that evidence, the plaintiffs' case is devoid of the proximate causation element. Thus, there is no genuine issue as to causation, and we are of opinion the district court properly granted the defendants' motion for summary judgment on that basis.

III.

We review a district court's decision denying leave to amend a complaint under Rule 15(a) for abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court should grant leave to amend unless the motion was made in bad faith or after undue delay, or with a dilatory motive, or the amendment would cause undue prejudice to the non-moving party, or the amendment would be futile. *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (quoting *Foman*, 371 U.S. at 182). A district court should not deny leave to amend because of mere delay. *Island Creek*, 832 F.2d at 279. Delay must be accompanied by prejudice, bad faith, or futility to comprise sufficient basis for denial of leave to amend. *Island Creek*, 832 F.2d at 279. Under the facts of this case, we are of opinion that the district court did not abuse its discretion in denying the plaintiffs leave to amend their complaints.

The district court denied Mrs. Marsh's 1992 motion to amend her complaint to include 2,4-D as a cause of her cancer after finding not

only that the plaintiff had unduly delayed in making the motion, but also that granting the motion would cause prejudice to the defendants. The court observed that the parties had engaged in extensive, continuing, and expensive discovery directed to picloram. Adding another chemical at that point in the proceedings, after defendants had filed a motion for summary judgment, would basically force the parties to start the discovery proceedings anew. Additionally, the court noted that the plaintiff had known of the presence of 2,4-D since early in the litigation and, essentially, had no justifiable reason for waiting to file her motion to amend when the court had granted one such motion in early 1991. Unlike the case in *Island Creek*, discovery here did not progress at a desultory pace, the plaintiff did not discover the new contaminant recently, and both parties had concentrated their discovery and efforts on picloram. See *Island Creek*, 832 F.2d at 279-80 (finding district court abused its discretion in denying leave to amend complaint to include a new, recently discovered basis for relief).

The district court was also acting within its discretion when it denied Speer's 1994 motion to amend his complaint. The four year delay before Speer's motion to amend was unnecessary. The same attorney represents all three plaintiffs, and he made an almost identical motion to amend in Mrs. Marsh's case. The two year delay between that motion and the one in Speer's case is unjustifiable. All of the facts necessary for such a motion had been available to the attorney for over four years. Additionally, as the district court noted, granting the motion at that time would prejudice the defendants. The case had reached summary judgment stage and the parties had completed years of discovery that the defendants would be forced to repeat if the court allowed a new causal chemical into the case. It appears that the plaintiffs' amendment was no more than a last chance attempt to ward off summary judgment, which is not well taken. Cf. *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1149 (4th Cir. 1988).

While we acknowledge that plaintiffs should have the right to amend their complaints freely as the ends of justice require, we are of opinion that the facts in this case support the district court's discretionary decisions to deny amendment to the complaints.

For the reasons expressed in the opinion of the district court, its judgment is accordingly

*AFFIRMED.**

*The motion that we reconsider a clerk's order denying plaintiffs' motion to supplement the brief is denied.

In The
United States Court of Appeals
for the Fourth Circuit

Filed
December 17, 2003

HALIA S. MARSH, Executrix of the estate of Robert Sidney Marsh, *Plaintiff-Appellant,* v. W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY, *Defendants-Appellees.*	No. 98-1943
THEODORE C. MCLEOD, *Plaintiff-Appellant,* v. W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY, *Defendants-Appellees.*	No. 98-1944
THOMAS R. SPEER, *Plaintiff-Appellant,* v. W. R. GRACE & COMPANY; FRIT INDUSTRIES, INCORPORATED; CONTINENTAL CASUALTY COMPANY, *Defendants-Appellees.*	No. 98-1945

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing in banc is denied.

Entered for a panel comprised of Judge Widener, Judge Luttig, and Judge Michael.

For the Court

/s/ Patricia S. Connor

Clerk

(2)
Supreme Court, U.S.
FILED
No. 031499 MAR 16 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

SUPPLEMENTAL APPENDIX

JOHN RANDOLPH INGRAM
618 Sunset Avenue - Suite 100
Asheboro, NC 27203
(843) 455-3301
Petitioners' Counsel of Record

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Judgment Order, U.S. District Court for the Middle District of North Carolina, entered 5/26/98 ..... Supp. A-1

Memorandum Opinion, U.S. District Court for the Middle District of North Carolina, entered 5/26/98 ..... Supp. A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

HALIA S. MARSH, Executrix of the
ESTATE of ROBERT SIDNEY MARSH,
Plaintiff,

v. 3:90CV00613

W.R. GRACE & CO., et al.,
Defendants.

THEODORE MCLOUD, Executor of the
ESTATE of BEULAH M. MCLOUD,
Plaintiff,

v. 3:91CV00047

W.R. GRACE & CO., et al.,
Defendants.

THOMAS R. SPEER,
Plaintiff,

v. 3:91CV00048

W.R. GRACE & CO., et al.,
Defendants.

JUDGMENT

For the reasons described in the Memorandum Opinion filed contemporaneously with this Judgment, Defendants' motions for summary judgment in each of the above-captioned cases are hereby GRANTED. Any remaining motions are DENIED as MOOT.

This the 26th day of May, 1998.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

HALIA S. MARSH, Executrix of the
ESTATE of ROBERT SIDNEY MARSH,
Plaintiff,

v. 3:90CV00613

W.R. GRACE & CO., et al.,
Defendants.

THEODORE MCLOUD, Executor of the
ESTATE of BEULAH M. MCLOUD,
Plaintiff,

v. 3:91CV00047

W.R. GRACE & CO., et al.,
Defendants.

THOMAS R. SPEER,
Plaintiff,

v. 3:91CV00048

W.R. GRACE & CO., et al.,
Defendants.

MEMORANDUM OPINION

TILLEY, District Judge

These related cases are before the Court on a number of motions, including motions to dismiss, motions in limine, and motions for summary judgment. Defendants' motions for summary judgment in each of these cases are GRANTED for the reasons described below. Any remaining motions are DENIED as MOOT.

I.

The plaintiffs in this case are all residents of Moore County, North Carolina. Robert Sidney Marsh and Thomas Speer, Mr. Marsh's brother-in-law, both worked on the farm belonging to Waymon Marsh, Robert Marsh's son. Beulah S. McLeod worked with her husband, Theodore McLeod on their farm.[1] Defendant W.R. Grace & Co. ("Grace") is a Connecticut corporation with its principal place of business outside of North Carolina. Defendant Frit Industries, Inc. ("Frit") is incorporated in and has its principal place of business in Alabama. Defendant Continental Casualty Company ("CCC") is incorporated in and has its principal place of business in Illinois.

Construed in the light most favorable to Plaintiffs, the facts are as follows: In 1984, Waymon Marsh and Theodore McLeod purchased tobacco fertilizer manufactured by Grace called "Gold Dollar" fertilizer. Frit produced a micronutrient mix used by Grace as an ingredient in Gold Dollar fertilizer,

---

[1]For simplicity, this Opinion will refer to Mr. Robert Marsh, Mr. Speer and Mrs. Mcleod as "Plaintiffs," despite the fact that it is actually the estates of Mr. Marsh and Mrs. McLeod that have brought suit.

while CCC insured Grace. Unbeknownst to Mr. Waymon Marsh, Mr. Mcleod, or Plaintiffs, the Gold Dollar fertilizer they purchased contained small amounts of picloram, a broadleaf herbicide.

The Gold Dollar fertilizer was applied to tobacco crops and to vegetable gardens on both the Marsh and McLeod farms in 1984. From that year on, Plaintiffs were exposed to picloram in the fertilizer by handling it, through contact with soil and water contaminated by the fertilizer, and by eating vegetables from the gardens to which it had been applied and fish from a pond contaminated by fertilizer run-off.

Within the next four years, Plaintiffs all suffered from some form of cancer. Robert Marsh was diagnosed with lung cancer in early October of 1988, and he died from complications of the disease approximately two weeks later, at the age of 78. Thomas Speer was diagnosed with colorectal cancer in March of 1988 but was successfully treated for the disease. He was 65 at the time. Beulah McLeod was diagnosed with cervical cancer in late August or early September of 1986 and died from the disease approximately two years later, at the age of 74.[2]

II.

Plaintiffs have made claims against Defendants, including breach of warranty, civil conspiracy, failure to warn, negligent manufacture of fertilizer, and unfair

---

[2]In another suit since dismissed by the North Carolina state courts, Mr. Waymon Marsh claimed that his irritable bowel syndrome was aggravated after he was exposed to picloram in Gold Dollar fertilizer.

settlement practices, all based on the presence of picloram in the Gold Dollar fertilizer. The damages alleged for each claim arise from the cancers suffered by Mr. Marsh, Mr. Speer, and Mrs. McLeod. Therefore, none of these claims can succeed unless Plaintiffs can prove that their cancers were proximately caused by picloram in the fertilizer. Because Plaintiffs cannot prove such a connection, summary judgment for Defendants on all claims is appropriate. No ruling is necessary on any of Defendants' other arguments in favor of summary judgment.

Summary judgment is proper only if there is no genuine issue as to any material fact. The party moving for summary judgment has the burden of: (1) pointing to deficiencies in the record as to matters upon which the opposing party has the burden of proof such that the opposing party cannot prove its claim or defense, or; (2) showing otherwise why, upon the undisputed facts in the record, the moving party is entitled to judgment as a matter of law. The party opposing the motion for summary judgment may not merely rest on its pleadings, but must provide evidence or point to evidence already in the record, properly authenticated pursuant to Rule 56(e), that would be sufficient to support a jury verdict in its favor. See Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993). The test to be applied in determining sufficiency of the evidence on the questioned point, therefore, mirrors that applied at the directed verdict (now "judgment as a matter of law") stage of a trial. See Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir. 1988), cert. denied, 490 U.S. 1107 (1989).

In this case, Plaintiffs' only evidence concerning the causal link between picloram exposure and their cancers comes from the deposition testimony and affidavits

submitted by their proffered expert, Dr. Alan S. Levin, M.D. Dr. Levin's testimony lacks sufficient indicia of scientific validity and is therefore inadmissable under Federal Rule of Evidence 702. Without his testimony, the record is deficient with respect to Plaintiffs' ability to prove causation.

The admissibility of expert scientific testimony is governed by Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702. This rule requires a trial judge to determine "whether the reasoning or methodology underlying the testimony is scientifically valid and... whether that reasoning or methodology properly can be applied to the facts in issue." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796, 125 L. Ed.2d 469 (1993); see also Cavallo v. Star Enter., 100 F.3d 1150, 1158 (4th Cir. 1996) (quoting Daubert). The validity of the reasoning or methodology underlying the testimony is generally determined by five factors:

> (1) whether the testimony has been tested, (2) whether it has been published or exposed to peer review, (3) its rate of error, (4) whether there are standards and controls over its implementation, and (5) whether it is generally accepted.

Cavallo, 100 F.3d at 1158 (citing Daubert). If the testimony is valid, whether the testimony "properly can be applied to the facts in issue" is determined by reference to other rules of evidence, including Rules 401 and 403. Cavallo, 100 F.3d at 1158.

Dr. Levins's testimony fails the first part of the Daubert inquiry. Neither his reasoning nor his methodology is scientifically valid; they satisfy none of the applicable factors suggested in Daubert. Despite the fact that each Plaintiff suffered from a different type of cancer, Dr. Levin's testimony concerning the link between picloram exposure and cancer is basically the same for each Plaintiff. In each case, his analysis focuses on the temporal link between exposure to picloram and the onset of the cancers. He describes his analytical process several times, slightly differently each time, but the following description is representative:

> I looked at a group of individuals who were exposed to a known carcinogen. I looked at laboratory results in two of them.[3] I looked at the history around the development of the disease process. I looked at the temporal association between the exposure and the development of the disease process. And I know that — and I also looked in the literature to see whether picloram could have done what happened to these patients. And with all that data I made the opinion that picloram caused the disease in

---

[3]One of the individuals referred to here is Mr. Waymon Marsh, who is not a plaintiff in this case.

these individuals.

(Levin Dep. at 414; see also id. at 245, 311.) His underlying theory of disease is that:

> all disease is a function of the host, not of the etiologic agents, and if the host is set up to get cancer, the the etiological agent can get [sic] cancer. Then on the other hand if the host is set up to get lupus, then the etiological agent can cause lupus.

(Id. at 285.) This theory purportedly accounts for the different cancers which Dr. Levin opines were caused by picloram exposure.

Dr. Levin's testimony that picloram caused Plaintiffs' cancers fails the first factor identified by Daubert, that his theory be subject to testing. See Cavallo, 100 F.3d at 1158. Scientific methodology is based on generating hypothesis and then testing them to see if they can be falsified. See Daubert, 509 U.S. at 593, 113 S. Ct. at 2796. Dr. Levin's diagnosis is based on a process that is nearly opposite to the scientific method, one in which he reached a conclusion and then generated, but did not test, hypothesis to support his conclusion. Cf. Sornesen ex rel. Dunbar v. Shaklee Corp., 31 F.3d 638, 649 (8th Cir. 1994) ("Instead of reasoning from known facts to reach a conclusion, the experts here reasoned from an end result in order to hypothesize what needed to be known but was not."); Claar v. Burlington N. R.R., 29 F.3d 499, 502-503 (9th Cir. 1994) ("Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method." The following testimony serves as an example:

> Q. Are you telling me, Dr. Levin, that with respect to each of the cancers we're dealing with, Mr. Speer's colorectal cancer, Mr. Marsh's lung cancer, and Mrs. McLeod's cervical cancer, that because it is your opinion that it was caused by picloram, it therefore follows that their first manifestation was at a sufficient point in time after exposure to be within a temporal time frame that is acceptable to you?
>
> A. I think that's what I'm saying.

(Levin Dep. at 411) Other examples of this kind of tautological reasoning abound in his opinion. (See, e.g., id. at 323 (testimony that picloram is a carcinogen because Mr. Speer was exposed to it before he got cancer), 346 (same testimony).) Dr. Levin did not conduct any objective tests that support his self-fulfilling hypothesis.

One way to test a hypothesis is to rule out alternative causes. See Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384 (1995); Claar, 29 F.3d at 502; Martin v. Diamant Boart Am., Inc., 114 F.3d 1176, 1997 WL 286123, *2 (4th Cir. 1997). Dr. Levin specifically testified that he did not attempt to rule out alternative causes for Plaintiffs' cancers. (See Levin Dep. at 341 ("Alternative causes? I don't know that I ruled anything out. I opined that picloram was a or the cause of the cancer. But I didn't rule out other etiology.")) He does not know what other pesticides, herbicides or fertilizers Mr. Marsh used on the farm, and he did not find out if any of those other substances were carcinogens. (See id. at 231-32.) Dr. Levin also has no opinion as to whether Mr. Marsh's 52 years of cigarette smoking was a cause of his lung cancer.

(See id. at 535.)[4] Dr. Levin did not ask for names of the carcinogenic organic solvents and other chemicals Mr. Speer used during his 31 years as an auto body shop employee, nor did he ask about other pesticides, herbicides, or fertilizers to which Mr. Speer was exposed while farming. (See id. at 219-22.) Dr. Levin even maintains that he does not need to know how many other carcinogens Mr. Speer was exposed to for the purposes of formulating his opinion. (See id. at 336-37.) Neither Dr. Levin's deposition nor his affidavits contain any description of a process whereby he eliminated alternative causes for Mrs. McLeod's cancer, either.

The only evidence Dr. Levin appears to have considered with respect to alternative causes is an autoimmune test on which Mr. Speer and Mr. Waymon Marsh both had elevated levels of smooth muscle antibodies. Dr. Levin interpreted these results as evidence that changes in Mr. Speer's blood were more likely caused by something to which they had both been exposed, the fertilizer, rather than something to which only Mr. Speer had been exposed. (See id. at 335.) Given the myriad of potential carcinogens to which Plaintiffs were exposed, this is not a sufficient examination of possible alternative causes.

Another way to test a medical hypothesis is by using

---

[4]In a supplemental affidavit filed after his deposition, Dr. Levin has suggested for the first time that Mr. Marsh's lung cancer was a type not linked to smoking. (Levin Aff. Nov. 1994 at 3.) A court is not required to consider a witness's subsequent affidavit which directly contradicts the witness's prior deposition testimony. See Rohrbough v. Wyeth Labs. Inc., 916 F.2d 970, 976 (4th Cir. 1990). Even taking this suggestion into consideration, however, Dr. Levin's opinion is still insufficiently tested.

lab or pathology data. Blood and/or tissue samples can be examined to see if they display phenomena predicted by or consistent with the hypothesis. See Benedi, 66 F.3d at 1378. Dr. Levin made no predictions and analyzed no blood or tissue samples from Mr. Marsh or Mrs. McLeod. For Mr. Speer, the only lab test on which he relied was the one which showed elevated levels of smooth muscle antibodies. (See Levin Dep. at 335.) This test, however, does not indicate what substance caused the elevated antibody level. (See id. at 617) Furthermore, Dr. Levin admitted that a person who had already had cancer at the time of testing, like Mr. Speer, would usually have test results outside the normal range. (See id.) There was therefore no laboratory analysis against which Dr. Levin's hypothesis was tested with respect to any of the Plaintiffs. See Conde v. Velsicol Chem. Corp., 24 F.3d 809, 813 (6th Cir. 1994)(rejecting testimony concerning autoimmune test results that could not be linked to the chemical at issue).

While the failure of Dr. Levin's testimony to satisfy the first Daubert factor is sufficient grounds to support its exclusion, his testimony fails the second factor identified in Daubert as well. The second Daubert factor is whether a theory has been subjected to publication and the accompanying process of peer review. See Cavallo, 100 F.3d at 1158. Dr. Levin has not conducted or published any studies concerning whether picloram is a carcinogen. He has published two studies dealing with his more general etiological theory of cancers caused by chemical exposure, (see id. at 48), but this is an insufficient ground on which to find his testimony valid with respect to picloram as a carcinogen, especially given the lack of general acceptance of his theory. See infra.

The third Daubert factor, the known or potential rate

of error of a particular scientific technique, see Cavello, 100 F.3D at 1158, is not directly relevant in this case becuase Dr. Levin did not use a technique with a measurable rate of error. However, Dr. Levin's untested assumptions regarding the amounts of picloram to which Plaintiffs were exposed create a potential for error that cannot be ignored when evaluating his testimony. Moreover, although he believes that there is a no-effect level of picloram for each of the Plaintiffs, he made no attempt to calculate that level for any of them. (See Levin Dep. at 286-87)

The other applicable factor identified by Daubert is whether a theory is generally accepted in the scientific community. See Cavello, 100 F.3d at 1158. Both Dr. Levin's opinion and the method through which he formulated it are at odds with principles generally accepted in the scientific community. In formulating his opinion, the first step he took was to perform an electronic database search "to satisfy [him]self that picloram could cause cancer." (See Levin Dep. at 199.) However, Dr. Levin read the full text of only two of the articles on which he purportedly based his opinion that picloram is a carcinogen; he read only the abstracts of the others. (See id. at 248-49) Only one of the articles that he actually read concluded that picloram was a carcinogen. (See id. at 186, 244.) Dr. Levin disclaims the need to read the entire text of such studies because he never relies on them but uses them only as "helpful guidelines." (See id. at 249-52.) Dr. Levin also claims that, in some cases, he can diagnose biological response modification system dysfunction, a condition he believes was a precursor to cancer in all of the Plaintiffs, on the basis of a medical history alone. (See id. at 444-45.) The cavalier approach taken in reaching these conclusions is inconsistent with good science. It also suggests that the rest

of Dr. Levin's analysis is similar.

Dr. Levin's conclusion that picloram is a carcinogen is also not generally accepted. It is undisputed that the only human epidemiological study concerning picloram concluded that there was no increased incidence of or mortality from cancer in people who had been regularly exposed to picloram, (See e.g., Joint Aff. App. B), although Dr. Levin dismisses this study as a "classic in fallacious epidemiological studies." (Levin Dep. at 244.) It is also undisputed that neither the National Toxicology Program nor the United States Environmental Protection Association has ever considered picloram a carcinogen. (See e.g., Joint Aff. App. B at B-7) Dr. Levin "Satisfied himself that picloram could cause cancer" by reading one article and the abstracts of two others which he says concluded that picloram was a carcinogen. (See Levin Dep. at 183-192.) There is no dispute, however, regarding Defendants' evidence that the one article Dr. Levin actually read, a study by Reuber et al., has been rejected by the general scientific community, (See Joint Aff. App. H at H-3-4), or regarding their evidence that the full text of the two abstracts on which Dr. Levin relied do not support the conclusion that picloram is a carcinogen. (See id. at H-4-6.)

Finally, it is undisputed that Dr. Levin's opinion that picloram in the dosages he assumes were received by Plaintiffs could have caused their cancers is not generally accepted. In the two generally accepted studies designed to test if picloram was an animal carcinogen, animals exposed to one million times more picloram did not contract cancer. (See id. at H-6.) It is clear that Dr. Levin's methodology and the conclusions he has drawn from it are not generally accepted within the scientific community.

In summary, Dr. Levin's testimony simply does not

have any indicia of scientific validity. His opinion that picloram caused Plaintiffs' cancers is untested, has not been subjected to peer review, is error-prone, and is not generally accepted. Even the "liberal thrust" of the Federal Rules cannot encompass "scientific" testimony that has such an unreliable foundation in the methods of science. Daubert, 509 U.S. at 588, 113 S. Ct. at 2794.

III.

For the foregoing reasons, Defendants' various motions for summary judgment are GRANTED. Defendants' other motions are DISMISSED as MOOT.

This the 26th day of May, 1998

_____/s/_____
United States District Judge

Supreme Court, U.S.
FILED
JUN 7 - 2004
OFFICE OF THE CLERK

No. 03-1499

In The Supreme Court of the United States

HALIA S. MARSH, Executrix of the estate of Robert Sidney Marsh, THEODORE C. McLEOD, Executor of the Estate of Beulah McLeod, and THOMAS R. SPEER,

Petitioners,

v.

W.R. GRACE & CO., FRIT INDUSTRIES, INCORPORATED, and CONTINENTAL CASUALTY COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE MACON PHARR
Counse of Record
PHARR & BOYNTON, PLLC
2720 Georgetown Drive
Winston-Salem, NC 27106
(336) 721-2400
Attorney for Respondents W.R. Grace & Company and Continental Casualty Company

JON BERKELHAMMER
SMITH MOORE LLP
First Union Plaza
300 North Greene Street
Greensboro, NC 27401
(336) 378-5200
Attorney for Respondent Frit Industries, Incorporated

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's discretionary exclusion of the Petitioners' expert witness testimony on the issue of proximate cause pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its subsequent grant of Summary Judgment in favor of Respondents.

2. Whether the Court of Appeals properly affirmed the District Court's discretionary denial of Petitioners' motions to amend their Complaints where the District Court found that the motions were unduly delayed and the proposed amendments would have been unfairly prejudicial.

CORPORATE DISCLOSURE STATEMENT

Respondent W. R. Grace & Co. has no parent corporations. No publicly traded corporations own more than 10% of the outstanding stock of W. R. Grace & Co.

Respondent Frit Industries, Incorporated has no parent corporations. No publicly traded corporations own more than 10% of the outstanding stock of Frit Industries, Incorporated.

Respondent Continental Casualty Company is a subsidiary of CNA Financial Corporation. CNA Financial Corporation is a publicly traded stock on the New York Stock Exchange, and it owns more than 10% of the outstanding stock of Respondent Continental Casualty Company. No other publicly traded corporations own more than 10% of the outstanding stock of Continental Casualty Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
RULES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
A. The Petitioners' Allegations	5
B. The Alleged Presence of and Exposure to Picloram	7
C. The Expert Evidence Regarding Picloram	9
REASONS FOR DENYING THE PETITION	12
I. NO COMPELLING REASON EXISTS TO REVIEW THE ACTION OF THE COURT OF APPEALS	14
1. The District Court properly excluded Dr. Levin's testimony	15
2. The District Court did not abuse its discretion in denying Petitioners' motions to amend their Complaints	21
3. No other compelling reasons exist to justify a Writ of Certiorari	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663 (5th Cir.), *cert. denied*, 454 U.S. 1098, 102 S. Ct. 672, 70 L. Ed. 2d 640 (1981) 23

Anderson v. W. R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986) 21

Beall v. Abbott Lab., 130 F.3d 614 (4th Cir. 1997) 15

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) ..... *passim*

Deasy v. Hill, 833 F.2d 38 (4th Cir. 1987), *cert. denied*, 484 U.S. 977, 108 S. Ct. 1271, 99 L. Ed. 2d 483 (1988) 22

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) 13, 23

General Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) 16, 20

Glesenkamp v. Nationwide Mut. Ins. Co., 71 F.R.D. 1 (N.D. Calif. 1974), *aff'd*, 540 F.2d 458 (9th Cir. 1978) 23

Island Creek Coal Co. v. Lake Shore, Inc., 832 F.2d 274 (4th Cir. 1987) 22

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) 16, 20

Lonestar Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922 (4th Cir. 1995) 22

MacDraw, Inc. v. The CIT Group Equipment Financing, Inc., 157 F.3d 956 (2d Cir. 1998) 22

TABLE OF AUTHORITIES – Continued

Page

Mercantile Trust Co. v. Inland Marine Products Corp., 542 F.2d 1010 (8th Cir. 1976) 23

Metropolitan Life Ins. Co. v. Pettit, 164 F.3d 857 (4th Cir. 1998) 15

Overseas Inns S.A. P.A. v. U.S., 911 F.2d 1146 (5th Cir. 1990) 23

Sandcrest Outpatient Services, P.A. v. Cumberland County Hosp. Sys., Inc., 853 F.2d 1139 (4th Cir. 1988) 23, 24

Shealey v. Winston, 833 F.2d 1009 (4th Cir. 1991) 22

U.S. v. Diaz, 300 F.3d 66 (1st Cir. 2002) 21

Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) 16

COURT RULES

Fed. R. Evid. 702 ..... 3, 16, 17, 18, 19

Fed. R. Civ. P. 15 ..... 4, 21

Sup. Ct. R. 10 14

MISCELLANEOUS

40 C.F.R. § 180.292 (1999) 11

OPINIONS AND ORDERS BELOW

The District Court's Judgment and Memorandum Opinion below, *Marsh v. W.R. Grace & Co.*, No. 3:90CV00613 (M.D.N.C. May 26, 1998), were not chosen for publication in the Federal Supplement, however, they have been reprinted in the Supplemental Appendix to the Petition at A-1 and A-3 respectively. The Fourth Circuit's Opinion below was not chosen for publication in the Federal Reporter; however the opinion, *Marsh v. W. R. Grace & Co.*, No. 98-1943, Prod. Liab. Rep. (CCH) ¶ 16,803 (4th Cir. November 19, 2003), has been reprinted in the Appendix to the Petition at A-1. Finally, the Fourth Circuit's Order denying Petitioners' Petition for Rehearing and Rehearing En Banc below was not chosen for publication in the Federal Reporter; however, the Order, *Marsh v. W. R. Grace & Co.*, No. 98-1943 (4th Cir. December 17, 2003) (order denying rehearing), has been reprinted in the Appendix to the Petition at A-12.

STATEMENT OF JURISDICTION

Each of these three cases, prior to consolidation by the United States District Court for judgment, were originally filed in the General Court of Justice, Superior Court Division, Moore County, North Carolina. Each action was timely removed to the United States District Court for the Middle District of North Carolina pursuant to 28 U.S.C. §§ 1441 and 1446. Jurisdiction in the District Court was

based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. (J.A. at 26-28, 1184-1187, 2507-2510.)[1]

Summary judgment as to all claims in these three cases was entered simultaneously on May 26, 1998. *Marsh*, No. 3:90CV00613. (Supp. App. at A-2.) Notices of Appeal were timely filed on June 25, 1998. (J.A. at 1165-1167, 2484-2486, 2895-2897.) Appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit was based upon 28 U.S.C. § 1291. (*Id.*)

On November 19, 2003, the Fourth Circuit entered its Opinion affirming the Judgment of the District Court. *Marsh*, No. 98-1943. (App. at A-1.) On December 17, 2003, the Clerk of Court for the Fourth Circuit entered an Order denying Petitioners' Petition for Rehearing and Rehearing En Banc. *Marsh*, No. 98-1943 (order denying rehearing). (App. at A-12.) Petitioners filed their Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) on March 16, 2003, within 90 days of the denial of their Petition for Rehearing.

RULES INVOLVED IN THIS CASE

Federal Rules of Evidence

Rule 104. PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a

[1] Citations to "J.A." are made to the Joint Appendix submitted to the Fourth Circuit.

privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Rule 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[2]

---

[2] Rule 702 of the Federal Rules of Evidence was amended April 17, 2000, effective December 1, 2000 to include the following language after the word "otherwise" at the end of the rule as reprinted here: "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Federal Rules of Civil Procedure

Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT OF THE CASE

Petitioners Halia S. Marsh, Executrix of the Estate of Robert Sidney Marsh ("Marsh"), Theodore McLeod, Executor of the estate of Beulah M. McLeod ("McLeod"), and Thomas R. Speer ("Speer")[3] brought separate actions against Respondents alleging that each of them contracted a different form of cancer allegedly due to the alleged exposure to traces of picloram allegedly found in fertilizer, known as "Gold Dollar," that was applied to their tobacco and vegetable crops in 1984. Picloram is a common broadleaf herbicide. The Gold Dollar fertilizer was manufactured by Respondent W.R. Grace & Co. ("Grace") and

[3] For the convenience of the Court, this brief will refer to Mrs. Marsh, Mr. McLeod, and Mr. Speer collectively as "Petitioners."

contained micronutrients manufactured by Respondent Frit Industries, Inc. ("Frit"). Respondent Continental Casualty Company provided insurance services to Grace. Petitioners' alleged claims against Respondents for civil conspiracy, failure to warn, false representations, negligence, breach of express and implied warranties, and unfair settlement practices. The Marsh Complaint was filed on or about October 16, 1990; the McLeod and Speer Complaints were filed on or about December 21, 1990.

On October 24 and October 28, 1991, after engaging in extensive discovery, each of the Respondents moved for summary judgment in the Marsh case on the grounds, among others, that the Plaintiff could not show that the alleged exposure to picloram proximately caused her husband's cancer. (J.A. at 145-147.) In November 1994, after further discovery, Respondents moved for summary judgment in the McLeod and Speer cases also challenging the Plaintiffs' evidence of proximate cause. (*Id.* at 2157-58.) On May 26, 1998, the District Court granted Respondents' motions for Summary Judgment in all three cases by way of one consolidated Memorandum Opinion and Judgment. (Supp. App. at A-2.)

STATEMENT OF FACTS

A. The Petitioners' Allegations.

In 1984, Marsh and McLeod purchased Gold Dollar fertilizer from Roy Burt Enterprises, Inc. (J.A. at 70, 1199, 2597.) The fertilizer was used on tobacco crops and small vegetable gardens. Petitioners allege that they were each exposed to picloram, a commonly used herbicide, which

they further allege was present in the Gold Dollar fertilizer, was a human carcinogen, and caused each of them to suffer a different form of cancer.

Marsh worked on a farm owned by his son, Waymon Marsh (the "Marsh Farm"). In October 1988 Marsh, at the age of 78, was diagnosed with lung cancer. (*Id.* at 87, 100.) At the time he was diagnosed, Marsh was found to have a 5 cm tumor in his lungs that had metastasized to his spine. (*Id.* at 87.) Marsh had smoked cigarettes for more than 50 years and had been exposed to numerous chemicals during his life as a farmer. (*Id.* at 88, 100.)

McLeod worked on a tobacco farm that she owned with her husband (the "McLeod Farm"). In August 1986, McLeod, at the age of 74, was diagnosed with cervical cancer, one of the most prevalent female cancers. (*Id.* at 2192-93.) A diagnostic workup revealed an I-B carcinoma of the cervix of approximately four to five centimeters in size. (*Id.* at 2224.) As with Marsh, McLeod had been exposed to numerous chemicals in her adult life while assisting her husband on their farm. (*Id.* at 2183-84, 2197.)

Speer worked on the Marsh farm and had also worked as an auto-body mechanic. In February 1986, at the age of 63, Speer complained of rectal bleeding during a regular check-up. The bleeding continued through 1987. (*Id.* at 2656.) A colonoscopy revealed a 2.7 cm colorectal tumor. Speer had a family history of colorectal cancer, which significantly increased his risk of developing the disease. (*Id.* at 2746.) As with both Marsh and McLeod, Speer had been exposed to numerous chemicals during his life. (*Id.* at 1452-55.)

B. The Alleged Presence of and Exposure to Picloram.

During the summer of 1984, various tobacco farmers throughout middle and eastern North Carolina, southern Virginia, and northern South Carolina noticed deformed leaves in tobacco fertilized with Gold Dollar. Upon learning of these problems, Grace undertook an investigation to determine the source of the leaf deformities. Not every farmer who purchased Gold Dollar experienced abnormal tobacco growth, and even on farms where deformities were present, they did not occur with uniformity. (*Id.* at 152, 187, 2161, 2168, 2549, 2586.)

In October 1984, Dr. A. D. Worsham of North Carolina State University conducted plant bioassays using numerous samples of materials collected under the direction of Dr. Daniel Simpson on behalf of Grace.[4] (*Id.* at 152-156, 2161-2165, 2579-2583.) Two-thirds of the plant bioassays of Gold Dollar did not reveal the presence of any herbicide. Of those bioassays that did detect the presence of herbicide, the bioassays did not, and could not, identify which particular herbicide, including picloram, was affecting the plants. (*Id.* at 153, 2162-64, 2580-82.)

The North Carolina Department of Agriculture also conducted a series of tests to determine the source of the leaf deformities by testing 62 different samples of Grace fertilizer by gas chromatography. Some of these tests did not detect the presence of any herbicide. Of those tests

[4] A bioassay is a test to determine the effect of a substance on a living thing, such as, in this case, tobacco. The bioassay test grew plants under controlled, scientific conditions.

that did detect herbicide, some detected dicamba and others detected picloram. (*Id.* at 186-87, 2167-68, 2585-86.)

Four independent laboratories performed gas chromatography and/or mass spectrometry on the samples to detect the presence of herbicides. In total, these laboratories performed 1,238 gas chromatographs. More than two-thirds of these tests did not detect the presence of any herbicides. Of those tests that did detect the presence of herbicide, different herbicides were detected including dicamba, 2,4-D, and picloram. (*Id.*)

The Gold Dollar fertilizer actually purchased and used on the Marsh and McLeod farms was never chemically tested to determine if it contained any herbicide, including picloram. Scientific tests of material from the Marsh farm, but not the McLeod farm, were conducted in 1985, 1987, and 1988. None of these tests indicated the presence of picloram. (*Id.* at 187-92.) No scientific tests indicate the presence of picloram in the fertilizer used on Petitioners' farms where they worked or in their gardens. (*Id.* at 93-98, 121-36, 186-93, 2632-40.)[6]

[6] The only evidence Petitioners presented to the District Court that the fertilizer used on the Marsh farm contained picloram consisted of the testimony of Benjamin Kittrell and Monroe Enzore who opined that the tobacco appeared to have been exposed to picloram based on photographs that were taken some time after 1984 and an examination of the crop in 1991. The Kittrell affidavits appear to have been reprinted, without any discussion, in the place of the Petitioners' Statement of Facts in their Petition. No similar evidence was submitted with regards to the McLeod farm.

C. The Expert Evidence Regarding Picloram.

Petitioners designated Dr. Alan S. Levin, M.D. ("Levin") as their sole expert witness with regard to the issue of whether picloram is a human carcinogen and if so whether exposure to picloram caused their specific cancers. (*Id.* at 435-67, 1231-2156.) The District Court properly found Levin's opinions to be inherently unreliable. They lack scientific methodology and are objectively unverifiable. Rather than determining if picloram was capable of causing a particular, site-specific cancer in humans and then determining whether each Petitioner was exposed to a sufficient dose of picloram to have caused his or her particular cancer, Levin reasoned in reverse. He relied upon the conclusion that Petitioners had cancer and *assumed* that it was caused by picloram. He admitted in his own testimony that he did not rule out alternative causes of the Petitioners' cancers:

> Q. How or did you rule out that alternative causes for this cancer?
>
> A. Alternative causes? I don't know that I ruled anything out. I opined that picloram was the cause or a cause of the cancer. But I didn't rule out other etiology.

(*Id.* at 1577.)

By contrast, in support of their motions for Summary Judgment, Respondents submitted the Joint Affidavit of Drs. Philip S. Guzelian, Robert C. James, and Gregory Smith. (*Id.* at 133-314, 2176-2308, 2647-2843.) At the time of the joint affidavit submitted to the District Court, Dr. Guzelian was a Professor of Medicine at the University of Colorado Health Sciences Center in Denver, Colorado who

also served as the Chief of the Section of Medical Toxicology and Co-Director of the Hepatobiliary Research Center. Dr. James was a toxicologist and research scientist employed as an Associate Professor in the Center for Environmental Toxicology at the University of Florida, Gainesville and as an Adjunct Professor at Florida State University and the Medical College of Wisconsin. Dr. Smith was a medical doctor and a senior medical epidemiologist in the Environmental Epidemiology Section, North Carolina Department of Environment, Heath, and Natural Resources.

In the Joint Affidavit, Respondents' experts described the scientific method for determining, to a reasonable degree of medical and scientific certainty, whether picloram caused the Petitioners' cancers as follows:

> (1) There must be convincing evidence that the chemical in question is capable of producing the alleged disease in humans [Toxicity];
>
> (2) There must be convincing evidence that the dose of the chemical received by the person exposed was of sufficient magnitude to have been capable of producing the alleged disease [Dose-Response];
>
> (3) There must be convincing evidence that the chemical exposure was temporally related to the onset of the disease [Temporality];
>
> (4) There must be a sufficient basis for carrying out a differential diagnosis, excluding other possible confounding or contributing etiologies that might have caused the alleged disease [Elimination of Confounders];

> (5) There must be scientific data which explains how the chemical produces the alleged effect on a cellular and biochemical level [Biological Plausibility].

(*Id.* at 206-07, 2185-86, 2657-58.) Applying this scientific methodology to the evidence in each of the Petitioners' cases, the Joint Affiants concluded, to a reasonable degree of medical and scientific certainty, that, among other things, Petitioners' evidence fails to show that their cancers resulted from the alleged exposure to picloram. (*Id.* at 259, 2197, 2669.)

The Joint Affiants concluded that picloram was not a carcinogen and thus cannot pass the toxicity inquiry described above. (*Id.* at 2209, 2684.) This conclusion is based upon substantial evidence that picloram is not carcinogenic. For example, the Environmental Protection Agency ("EPA") has never classified picloram as carcinogenic. In fact, the EPA considers 500 parts per billion an acceptable level of picloram in drinking water. (*Id.* at 219-21, 1216-17, 2210-20.) Similar regulations exist establishing safe levels of picloram in food commodities promulgated by the Office of Pesticide Programs, Office of Pesticide and Toxic Substances. *See, e.g.*, 40 C.F.R. § 180.292 (1999). In addition, an epidemiologic study followed a group of 141 Dow Chemical Company employees who were regularly exposed to one million times greater amounts of picloram than that to which the Petitioners hypothetically could have been exposed. (*Id.* at 162, 210, 2188-89, 2203-04, 2679.) That study found no site-specific cases of cancer deaths. Two animal bioassays conducted by the National Cancer Institute specifically

designed to determine the carcinogenic potential of picloram also demonstrated that picloram is not carcinogenic. (J.A. 1216-19, 2203, 2205, 2206, 2678, 2681, 2573-75.)

In addition to finding that picloram is not carcinogenic, the Joint Affiants specifically addressed the potential for other causes of Petitioners' cancers. They opined that Marsh's lung cancer was far more likely caused by his 52 years of cigarette smoking than his exposure to fertilizer in 1984. (*Id.* at 226-28.) Likewise, McLeod's cervical cancer is one of the most prevalent female cancers in the world, the most common cause of which is viral infection, not environmental chemical exposure. (*Id.* at 2193-94.) Finally, Speer's colorectal cancer is also one of the most common forms of cancer in the United States, and Speer's family history of that specific cancer suggested that he probably had a genetic predisposition to developing it. (*Id.* at 2665-66.)

Respondents' Joint Affiants further addressed the Toxicity, Dose-Response, Temporality, and Biological Plausibility inquiries outlined above. In each case, the Joint Affiants concluded that there was no connection between picloram and the Petitioners' cancers. (*Id.* at 2209, 2684 (Toxicity), 216-19, 219-20, 2685-90 (Dose-Response), 222-25, 2192-93, 2664-65 (Temporality), 225-31, 2195-97, 2666-69 (Biological Plausibility).)

REASONS FOR DENYING THE PETITION

The Petitioners' nearly incomprehensible Petition for Writ of Certiorari appears to attempt to raise four questions to be presented for review before the Supreme Court. Two of the questions presented do not arise from the

holding of the Fourth Circuit below. Petitioners appear to request a Writ of Mandamus, without calling it as such, commanding a "ruling on Plaintiffs' Rule 60 Motion," which, according to the Petition, was filed after the Notice of Appeal had been made "to point out errors in the Trial Court Decision." (Pet. at 11-12.) Petitioners also seek review of whether the District Court erred by failing to enter a Pretrial Scheduling Order in some, but not all, of the cases, an allegation of error not raised before the Fourth Circuit and which has no connection whatsoever with the Fourth Circuit's Opinion or to the critical issue of whether a grant of summary judgment was appropriate.

The two remaining questions presented framed by Petitioners relate to the admissibility of Dr. Levin's testimony. The first question presented poses, in more general terms, whether the District Court erred in granting summary judgment and suggests that the Fourth Circuit may have violated the principles of *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). No specific discussion of either *Daubert* or *Foman* is made in the Petition, so it is unclear exactly what the alleged error committed by the Fourth Circuit may be. *Foman* appears to be cited for the proposition that Petitioners challenge the denial of their motions to amend their respective Complaints. *Daubert* appears to have been cited for the proposition that Petitioners challenge the exclusion of their expert, Dr. Levin, which resulted in the grant of summary judgment. The remaining question presented appears to suggest that there may be a conflict between the First Circuit Court of Appeal and the Fourth Circuit Court of Appeal regarding the admissibility of Dr. Levin's testimony.

A simple examination of the record below and the Opinion of the Fourth Circuit reveals that there are no compelling reasons for the Supreme Court of the United States to grant a Writ of Certiorari in this matter. The central inquiry regarding the admissibility of Dr. Levin's testimony is nothing more than an unexceptional examination of the admissibility of a proposed expert's testimony – an examination performed by the trial court to which appellate courts give great deference. Likewise, the denial of a motion to amend pleadings is a decision placed squarely within the discretion of the trial court. The cases present nothing novel or unique. Most importantly, however, the Court should not grant a Writ of Certiorari because the Fourth Circuit did not err in affirming the decision of the District Court.

I. NO COMPELLING REASON EXISTS TO REVIEW THE ACTION OF THE COURT OF APPEALS

Rule 10 of the Rules of the Supreme Court outlines exemplary considerations in the evaluation of whether a Writ of Certiorari should issue in a particular case. While the examples provided are merely illustrative, the Rule is clear in its expectation that a Writ of Certiorari should issue only "for compelling reasons." Sup. Ct. R. 10. There are no compelling reasons for a Writ of Certiorari to issue in the case at bar. Nothing in the Fourth Circuit's Opinion below conflicts with the decisions of this Court or any other Court of Appeal. The opinion does not address any novel or important federal questions. Nothing regarding the content of the opinion or the procedure on appeal could be construed as a departure from the accepted and usual course of judicial proceedings. The Opinion of the Fourth Circuit below correctly stated and applied simple rules that previously have been addressed by this Court in detail and consistently and regularly applied by

Courts across the United States. Nothing in the Petition suggests that the Court should consider a reversal or change in the existing law, and the Petition fails to demonstrate any error on the part of the Fourth Circuit.

1. The District Court properly excluded Dr. Levin's testimony.

In reviewing the District Court's grant of Summary Judgment, the Fourth Circuit recognized that the standard of review was *de novo*. *Marsh*, No. 98-1943 slip op. at 5, *citing*, *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857, 860 (4th Cir. 1998). (App. at A-5.) In conducting its review, all facts as found by the District Court were taken in the light most favorable to the Petitioners. *Marsh*, No. 98-1943 slip op. at 5, *citing*, *Beall v. Abbott Lab.*, 130 F.3d 614, 618-619 (4th Cir. 1997). (App. at A-3.) In viewing the case in this light, the Fourth Circuit assumed, as the District Court did as well, that the Gold Dollar fertilizer sold by Grace did in fact contain picloram, *Marsh*, No. 98-1943 slip op. at 3 (App. at A-3.); *Marsh*, No. 3:90CV00613 (Supp. App. at A-5.), despite evidence that picloram was never specifically found on the Petitioners' farms and studies which indicated that not all Gold Dollar fertilizer contained herbicides of any kind (J.A. 153, 186-92, 2162-64, 2167-68, 2580-82, 2585-86). The Fourth Circuit also assumed, just as the District Court did, that the Petitioners themselves were actually exposed to picloram through handling of the fertilizer, by eating vegetables grown with the fertilizer, and by consuming fish caught in a pond located near fields where the fertilizer was used, *Marsh*, No. 98-1943 slip op. at 3 (App. at A-3.); *Marsh*, No. 3:90CV00613 (Supp. App. at A-5.), despite the lack of evidence that the Petitioners themselves were actually

exposed to picloram (J.A. at 93-98, 121-36, 186-93, 2632-40).

The District Court held that because the Petitioners all claimed that their sole damages were the cancers they suffered, a case-dispositive issue in all cases was whether there was any evidence that the Petitioners' cancers were proximately caused by exposure to picloram. *Marsh*, No. 98-1943 slip op. at 5 (App. at A-5); *Marsh*, No. 3:90CV00613 (Supp. App. at A-6.). Both the Fourth Circuit and the District Court recognized that the sole evidence presented to the District Court by the Petitioners on the issue of proximate cause was the testimony of Dr. Levin. *Id.* Under both the Fourth Circuit and District Court's analyses, the issue of whether summary judgment in favor of the Respondents was proper therefore turned on the District Court's decision to exclude Levin's testimony.

A District Court's decision to admit or exclude expert testimony is reviewed under an abuse of discretion standard. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). This follows the Supreme Court's admonition that trial courts be provided "considerable leeway" in exercising their duty under Rule 104 of the Federal Rules of Evidence to evaluate the admissibility of evidence proposed under Rule 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156, 119 S. Ct. 1167, 1178, 143 L. Ed. 2d 238 (1999). Accordingly, the Fourth Circuit was charged with the duty to examine the record before it and reverse the decision of the District Court only if the District Court made a clear error in judgment. *See Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999).

The critical analysis performed by the District Court in assessing Levin's testimony was grounded in Rule 702 of the Federal Rules of Evidence as explained in *Daubert*. Rule 702 plainly states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

In *Daubert*, this Court analyzed the requirements of Rule 702 with specific attention to the issue of how a Court should determine whether a proposed expert should be permitted to testify under the rule. Under *Daubert*, the District Court must make a "preliminary assessment [1] of whether the reasoning or methodology underlying [the proposed expert] testimony is scientifically valid and [2] of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-593, 113 S. Ct. at 2796. In other words, the trial court is vested with the responsibility of determining, before any testimony of the expert is considered, whether the expert's methods are reliable and whether the testimony would be helpful to the jury to determine a fact in issue. The Fourth Circuit limited its consideration of Levin's testimony to the reliability inquiry required by *Daubert* since there was no dispute that the testimony was relevant to the issue of proximate cause. *See Marsh*, No. 98-1943 slip op. at 6 (App. at A-5).

To assist trial courts in deciding whether proposed testimony is sufficiently reliable to pass muster under Rule 702, *Daubert* provided four examples of ways in which the reliability of a particular method can be assessed: (1) that the method is capable of being tested and has been tested, (2) that the method is subjected to peer review and publication, (3) that the method has a known or knowable rate of error, and (4) that the method has attained general acceptance in the pertinent scientific community. *See Daubert*, 509 U.S. at 593-94, 113 S. Ct. at 2796-97. Both the District Court herein and the Fourth Circuit recognized the *Daubert* factors and applied them to the factual record before them. *See Marsh*, No. 98-1943 at slip op. at 6-9 (App. at A-6-A-9); *Marsh,* No. 3:90CV00613 (Supp. App. at A-7-A-15).

The Fourth Circuit held that the District Court did not abuse its discretion in excluding Levin's testimony. *See Marsh*, No. 98-1943 at slip op. at 6-9. In affirming the District Court's decision, the Fourth Circuit observed that (1) Levin's testimony was not subject to testing because Levin started with the conclusion that picloram caused the Petitioners' cancers and then generated a hypothesis to support his conclusion, (2) the only laboratory test relied upon by Levin did not identify the specific agent that caused the Petitioners' cancers, (3) Levin failed to rule out any alternative causes for the Petitioners' cancers, (4) Levin's assertion that picloram is a carcinogen is inapposite to much of the scientific literature available, (5) Levin's inability to determine the minimum exposure to picloram necessary to cause cancer created an unacceptable potential for error, and (6) Levin's methods are not generally accepted by the medical community. *See id.*

Levin's theory of disease is based upon the premise that the host is predisposed to the disease:

> The key here is that all disease is a function of the host, not of the etiologic agents, and if the host is set up to get cancer, then the etiologic agent can [cause] cancer. Then, on the other hand, if the host is set up to get lupus, then the etiologic agent can cause lupus.

(J.A. at 1521.)

Levin's analysis completely ignores the level of exposure to an alleged cancer-causing agent and the temporal relationship between the alleged exposure and the onset of the tumor. In his own words, "it is reasonable to *presume* that the exposure to a known carcinogen will cause cancer in an individual who develops cancer after an individual is exposed to that [carcinogen]." (*Id.* at 1835) (Emphasis added). In stating this presumption, Levin assumes, without demonstrating, that picloram is itself a cancer-causing agent and that Petitioners were not exposed to any other cancer-causing agents.

Both the District Court and the Fourth Circuit strictly followed the analysis of *Daubert*. The Petitioners point to no example of any failure of the District Court or the Fourth Circuit to properly analyze Levin's testimony in light of Rule 702, *Daubert* or any other case concerning the admissibility of expert witness testimony. The bulk of the Petition for Writ of Certiorari is composed of unconnected quotes and citations to medical journals and affidavits that have no bearing on the issues decided by the Fourth Circuit. Petitioners complain that the Affidavits of Benjamin Kittrell, reprinted as the "Statement of Facts" in the Petition, were not allowed by the District Court; however,

nothing in the Kittrell Affidavits is related to the consideration of Levin's methodology or the reliability of his opinions. Furthermore, Kittrell's affidavits do not address the critical issue of whether picloram proximately caused Petitioners' cancers.

Portions of the Petition appear to suggest that a District Court Judge in the First Circuit had already ruled that Levin was a reliable expert witness; therefore, the refusal of the District Court herein to allow Levin to testify indicates a conflict between the First and Fourth Circuits. It does not appear, from the content of the Petition, that Petitioners allege that the Fourth Circuit has adopted a standard different from *Daubert* in the evaluation of the reliability of expert witness testimony, nor does it appear that the Petitioners allege that the First and Fourth Circuits have established different and opposing views of *Daubert*. The suggestion is that merely because one District Court judge allowed Levin to testify that the District Court herein was somehow controlled by that decision.

Nothing in *Daubert* suggests that an expert allowed by one court for one purpose must therefore be allowed by all courts in all cases. Such a holding would divest trial courts of the discretion purportedly granted to them under this Court's opinions in *General Elec.*, *supra*, and *Kumho Tire*, *supra*. The District Court's application of the principles outlined in *Daubert* is consistent with this Court's prior holdings regarding the obligation of the trial court to ensure that expert witness testimony is inherently reliable. The Fourth Circuit's careful and deliberate consideration of the District Court's actions and the record below was consistent with the Rules of Evidence and the decisions of this Court. The District Court properly applied the

teachings of this Court and the subsequent appellate decisions in this area, and the Fourth Circuit properly reviewed the decision of the District Court. Accordingly, there is no reason to grant the Petition.

Nevertheless, the only case within the First Circuit that Respondents have been able to locate that even refers to "Dr. Alan S. Levin" is a District Court memorandum in the case of *Anderson v. W. R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986), decided seven years before this Court's decision in *Daubert*. *Anderson* involved a series of claims made by and on behalf of children who suffered leukemia allegedly due to exposure to contaminated water. The case does not involve picloram, dicamba, or 2,4-D, nor does it appear to involve lung cancer, cervical cancer, or colorectal cancer. In addition, *Anderson* does not address the admissibility of Levin's testimony, much less the admissibility of his testimony under *Daubert*. Moreover, *Daubert* has been recognized and applied in the First Circuit under the same analytical framework outlined above, *See U.S. v. Diaz*, 300 F.3d 66 (1st Cir. 2002). Because *Anderson* does not address the admissibility of Levin's testimony, and because it was a District Court decision and not an appellate court decision, there is no conflict among the circuits that would necessitate this Court's intervention on a Petition for Certiorari.

2. The District Court did not abuse its discretion in denying Petitioners' motions to amend their Complaints.

Marsh moved to amend her complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure in March 1992 after extensive discovery had already been completed. The proposed amendment would have changed

Marsh's theory of the case to allege that her decedent's cancer was caused by chemicals other than picloram. The District Court denied Marsh's motion on the grounds that she had unduly delayed making the motion and it would be unfairly prejudicial to the defendants. An identical motion was made in the Speer case in October 1994, and it was denied by the District Court for the same reasons. The Fourth Circuit affirmed the District Court's ruling on both counts. *Marsh*, No. 98-1943 at slip op. at 9, 10 (App. at A-9-A-10.)

Although Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires," Fed. R. Civ. Pro. 15, courts have consistently held that a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent, *See Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987), *cert. denied*, 484 U.S. 977, 108 S. Ct. 1271, 99 L. Ed. 2d 483 (1988). Leave to amend will be denied if the amendment is sought with undue delay or bad faith, if it is sought only as a dilatory motive, or if it would prejudice the opposing party. *See Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987). Furthermore, a motion to amend will be denied when the proposed amendment would be futile or would belatedly add claims that change the character of the litigation. *See Shealey v. Winston*, 833 F.2d 1009 (4th Cir. 1991); *Deasy, supra*; *See also Lonestar Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922 (4th Cir. 1995) (affirming denial of motion to amend to assert fraud defense "that would have raised new issues, which were not involved in the case during discovery and were not the subject of Plaintiff's discovery and trial preparation); *MacDraw, Inc. v. The CIT Group Equipment Financing, Inc.*, 157 F.3d 956

(2d Cir. 1998) (no abuse of discretion in denying motion to amend which would have prejudiced the defendants by adding a claim more than five years after filing the complaint); *Mercantile Trust Co. v. Inland Marine Products Corp.*, 542 F.2d 1010, 1013 (8th Cir. 1976) (no abuse of discretion where district court refused to allow late amendment which would add new theories of defense and which "would necessarily reopen much of the discovery"). In particular, courts will not allow belated amendments intended to avoid the consequences of dispositive motions, especially when the attempted amendment changes the factual basis of a claim. *See Sandcrest Outpatient Services, P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139 (4th Cir. 1988); *Overseas Inns S.A. P.A. v. U.S.*, 911 F.2d 1146 (5th Cir. 1990); *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir.), *cert. denied*, 454 U.S. 1098, 102 S. Ct. 672, 70 L. Ed. 2d 640 (1981); *Glesenkamp v. Nationwide Mut. Ins. Co.*, 71 F.R.D. 1 (N.D. Calif. 1974), *aff'd*, 540 F.2d 458 (9th Cir. 1978).

The Fourth Circuit reviewed the District Court's decision denying the Petitioners' motion for leave to amend their Complaints under an abuse of discretion standard. *See Foman*, 371 U.S. at 182, 83 S. Ct. at 230. The Fourth Circuit agreed with the District Court that the Petitioners' motions to amend were primarily intended to thwart Respondents' motions for Summary Judgment. Secondly, the Fourth Circuit agreed that it would have been unfair to allow Petitioners the right to amend their Complaints to change the theory of their cases after extensive discovery had already been conducted especially in light of the fact that Petitioners had known of the presence of substances other than picloram in the Gold Dollar fertilizer since the earliest stages of this now very old case. Consistent with

the Fourth Circuit's earlier decision in *Sandcrest*, *supra*, the Fourth Circuit chose not to allow Petitioners to attempt to change the character of the litigation at a late and dispositive stage. Petitioners provide no explanation for the grounds upon which any court could find that the denial of these motions were an abuse of the District Court's discretion.

3. No other compelling reasons exist to justify a Writ of Certiorari.

Daubert has become part of the lexicon of American jurisprudence and a daily fact of life for trial judges across the country. The amendments to Rule 702 implemented in 2000 have institutionalized the factors to be considered by trial courts in carrying out their gatekeeping function. Other than the fact that the case at bar dealt with picloram and fertilizer, the process of evaluating an expert's reliability in this case did not differ from the process of evaluating an expert in any other case. Granting a Writ of Certiorari to evaluate this case would add nothing further to the Court's current *Daubert* jurisprudence.

The Fourth Circuit did not depart from the accepted and usual course of judicial proceedings, nor did it sanction such behavior on the part of the District Court. The Fourth Circuit's analysis of the District Court's actions was routine. The Court's analysis of the District Court's procedure tracked the language of *Daubert* almost word for word. The Petition makes no suggestion to the contrary. Rather, the Petition contains page after page of irrelevant and redundant material that does not bear on the central issue of whether Levin's methodology as revealed through his testimony before the District Court

at the time of Respondent's motions for Summary Judgment was admissible.

Nothing distinguishes the outcome of this case from other ordinary tort actions without proof of proximate cause. The Petition seeks to inflame the Court by repeatedly making reference to the deaths of two individuals and enormous jury verdicts in other cases, but none of those allegations bear on the admissibility of Petitioners' alleged proof of proximate cause. Nor is there anything to distinguish this case from the innumerable other cases addressing whether a motion to amend a complaint should be allowed. The rulings of the District Court in this were discretionary, which by their very nature are designed to give broad latitude to lower courts. The case was carefully considered at the trial level and by the Fourth Circuit, and no reason has been proffered to disturb those rulings.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted this the fourth day of June, 2004.

STEVE MACON PHARR
Counse of Record
PHARR & BOYNTON, PLLC
2720 Georgetown Drive
Winston-Salem, NC 27106
(336) 721-2400
Attorney for Respondents W.R. Grace & Company and Continental Casualty Company

JON BERKELHAMMER
SMITH MOORE LLP
First Union Plaza
300 North Greene Street
Greensboro, NC 27401
(336) 378-5200
Attorney for Respondent Frit Industries, Incorporated

No. 03-1499

In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD,
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY

JOHN RANDOLPH INGRAM
618 Sunset Avenue - Suite 100
Asheboro, NC 27203
(843) 455-3301
Petitioners' Counsel of Record

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

PETITIONERS' REPLY.....1

Preliminary Statement..... ...1

Reasons for Granting the Writ.....3

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases **Page**

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995), cert. denied, 516 U.S. 869, 133 L.Ed.2d 126 (1995).....4

Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962)*.....3

Howerton v. Arai Helmet, Ltd 358 N.C.___(2004).....3
N.C. Supreme Court, 383 PA 03.

Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 81 (1st Cir. 1998).....4

CONSTITUTIONAL PROVISION INVOLVED

The Bill of Rights provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

PETITIONERS' REPLY

Preliminary Statement

Why did Grace lie?

Initially it appeared that Grace had convinced Frit, which bragged that Grace was good at "suppressing the potentially damaging circumstances around the tobacco situation", to let Grace handle the contaminated fertilizer situation in 1984 in order to minimize damages to 1800 farmers. Grace had learned from an almost identical contamination in 1979 that a lie would have to be concocted to cover up all the dangerous phenoxy acid chemicals contained, **illegally**, in the Grace Gold Dollar Fertilizer, for which Frit had provided micronutrient mix. (In 1979 1200 farmers were paid a total of $20 Million when their tobacco was taken off the market, because fertilizer utilized contained, **illegally**, the dangerous phenoxy acid picloram, which was not covered up.)(All these facts were proved in the second Grace v. Frit trial when their insurance companies could not initially agree to a settlement. The trial court denied Petitioners any Discovery about the final settlement withdrawing Frit's appeal from a $12 Million Dollar jury verdict in the second trial [$1 Million first trial-2-4D-not proved].)

Subsequently it was discovered that Frit and Grace had EPA problems; therefore, neither wanted any more EPA problems. They did not want the world, including the EPA and these farmers, to know that there were multiple phenoxie herbicide chemicals in the Gold Dollar Fertilizer, because they undoubtedly knew about the peer review article listing picloram and 2-4D as phenoxy acids - **MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOXY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Exposure to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article cites exposure to 2-4D and Picloram as phenoxy acids.**

What was the lie? The lie told by Grace was that only

small trace amounts of Dicamba were in the Gold Dollar Fertilizer, and it was safe to work the tobacco and eat from vegetable gardens which also utilized this Gold Dollar Fertilizer. In order to minimize damages by preventing all the tobacco being taken off the market, Grace decided to publish that only small traces of Dicamba were in the Gold Dollar Fertilizer, and it was safe to eat from vegetable gardens which also utilized this Gold Dollar Fertilizer. Grace knew that the phenoxy acid Dicamba could cause similar symptoms in the tobacco as other phenoxy acids such as picloram and 2-4D, but Grace insisted the tobacco was still marketable.

Who was lied to by Grace? Grace lied, not only to the farmers but to the North Carolina Commissioner of Agriculture and the North Carolina Commissioner of Insurance, the news media and the public at large. Grace even lied to its own witnesses such as Dr. Kittrell, whose affidavit states he was told by Grace that Dicamba was the only contaminate. (See Petition,Foman v. Davis, 371 U. S. 1789(1962)

How was the lie disseminated by Grace? Grace's lie was disseminated by word of mouth from Grace representatives to farmers, letters and other memos and correspondence, but the most egregious publication was in **full page newspaper ads** throughout North Carolina. These ads were called the "Dicamba" ads, because no other phenoxy acid was mentioned in the ad except the word "Dicamba" .

Why was this a lie? There were multiple phenoxy acids (picloram, 2,4D and dicamba) **illegally** in the Gold Dollar Fertilizer, known to Grace by its own **secret test samples,** obtained before the first ad publication and never corrected in the newspapers, not to mention Grace never giving corrected information to Dr. Kittrell (Clempson University Extension), who was one of the Grace v. Frit star withesses. Another star witness, Dr. McNair (VPI University Extension, who identified picloram and 2,4D as contaminates in the fertilizer) testified to an "extremely large concentration" of the phenoxy acid in one sample at 10,000 parts per billion. (Petition pages 19 and 20. This was part of approximately 20 pages of his testimony in the second trial not sequentially numbered with the entire transcript purchased by one of counsel's clients from the court reporter.)

This was 5 times more deadly than that found in the 1979 Smith-Douglas case, which took all the tobacco off the market. Yet Grace and these defendants conspired to suppress this evidence during the growing season at a high risk to these farmers and probably those who smoked the 1984 tobacco. Grace's full page newspaper ads stated there were only small trace accounts of dicamba and Grace told the farmers it was safe to raise the tobacco and eat from gardens fertilized with their Gold Dollar fertilizer. Dr. McNair's testimony proves the lie – "small trace amounts" was egregiously false. He further testified to other dirty samples with several major peaks and confirmed the 2-4D phenoxy at the Frit plant and in the Gold Dollar Fertilizer. See Foman v. Davis, 371 U. S. 178(1962).

Reasons for Granting the Writ

In Howerton v. Arai Helmet, Ltd.,358 N.C._____(2004), the North Carolina Supreme Court suggests that the Daubert case should be revisited, relaxed and reconciled, as was needed in **Ruiz-Troche, infra,** (another 1st Circuit case, which allowed medical testimony, excluded by the trial judge who ignored **peer review publications**, as was done in the case suib judice by the trial judge and the 4th Circuit), as follows:

"One of the most troublesome aspects of the *Daubert* "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*. Indeed, this concern was adeptly described by the Ninth Circuit after *Daubert* had been remanded and again appealed:

[T]hough we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by

the scientific method."

The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, 516 U.S. 869, 133 L. Ed. 2d 126 (1995).** This same sentiment has been echoed in the writings of countless other courts and commentators. *See, e.g.*, ***Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998)** (noting that "choreographing the *Daubert* pavane remains an exceedingly difficult task. Few federal judges are scientists, and none are trained in even a fraction of the many scientific fields in which experts may seek to testify."); *Zuchowicz v. United States*, 870 F. Supp. 15, 19 (D. Conn. 1994) ("[J]udges may not always have the 'special competence' to resolve complex issues which stand 'at the frontier of current medical and epidemiological inquiry.'" (citations omitted)); *Goeb v. Tharaldson*, 615 N.W.2d 800, 812-13 (Minn. 2000) (observing that "*Daubert* takes from scientists and confers upon judges uneducated in science the authority to determine what is scientific. This approach, which necessitates that trial judges be 'amateur scientists,' has also been frequently criticized." (citations omitted)); 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6266, at 271 (1997) ("It is unrealistic to think that courts can resolve disputes concerning the scientific validity of issues on the frontiers of modern science where even the experts may

disagree. As a result, *Daubert* has been harshly criticized for imposing such a burden on the lower courts." (footnotes omitted)); George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other ScientificEvidence During the Decision-Making Process*, 72 St. John's L. Rev. 291, 333 (1998) (contending that "few judges possess the academic credentials or the necessary experience and training in scientific disciplines to separate competently high quality, intricate scientific research from research that is flawed").

When the United States Supreme Court jettisoned the "rigid 'general acceptance' requirement" of *Frye*, it did so in order to further the "'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *Daubert*, 509 U.S. at 588, 125 L. Ed. 2d at 480. We believe that in practice, however, application of the "flexible" *Daubert* standard has been anything but liberal or relaxed and that trial courts, such as the one in the present case, have often been reluctant to stray far from the original *Daubert* factors in their analysis of the reliability of expert testimony. As expressed by one critic,

> **Those who predicted that trial judges would flex their gatekeeper muscles to exclude vast quantities of plaintiffs' proposed expert causation opinion testimony in products liability cases have turned out to be right. The post-*Daubert* era can fairly be described as the period of "strict scrutiny" of science by non-scientifically trained judges.**

Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DePaul L. Rev. 335, 341 (1999); *see also Goeb*, 615 N.W.2d at 812-14 (rejecting *Daubert* on grounds that, among other things, *Daubert* has not achieved its stated intention of relaxing the barriers to the admissibility of expert testimony); 2 Michael H. Graham, *Handbook of Federal Evidence* § 702.5, at 461-62 (5th ed. 2001) ("*Daubert* is a very incomplete case if not a very bad decision. It did not, in any way, accomplish what it was meant to, i.e., encourage more liberal admissibility of expert witness evidence. In fact, *Daubert* overall in practice actually created a more stringent test for

expert evidence admissibility especially in civil cases."); David Crump, *The Trouble with* Daubert-Kumho*: Reconsidering the Supreme Court's Philosophy of Science*, 68 Mo. L. Rev. 1, 40 (2003) ("[A]s often happens, a premature pronouncement that was intended to be flexible has become an established set of criteria. It was foolhardy for the Court to ignore what was going to happen, which was that trial judges would consider the four *Daubert* factors to be legal principles established by the Supreme Court." (footnotes omitted)).

As a consequence of these stringent threshold standards for admitting expert testimony, we are concerned with the case-dispositive nature of *Daubert* proceedings, whereby parties in civil actions may use pre-trial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed. As expressed in dicta by one federal trial court,

This court notes that inherently, the judge's role in a *Daubert* determination [is] fraught with conflict. In most cases, if the court bars the testimony of one party's expert witness or witnesses, that party is unable to present an essential element of his or her claim, or to proffer a defense. Accordingly, judges are aware that applying *Daubert* heavy-handedly has the effect of lightening one's caseload, as a party stripped of its expert often must dismiss the claims or settle thelawsuit. *Brasher v. Sandoz Pharms. Corp.*, 160 F. Supp. 2d 1291, 1295 n.12 (N.D. Ala. 2001); *see also* Lloyd Dixon & Brian Gill, RAND Institute for Civil Justice, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision* 62 (2001) ("Challenges to expert evidence increasingly resulted in summary judgment after *Daubert*.").

Procedurally, this imbalance may be explained because trial courts apply different evidentiary standards when ruling on motions to exclude expert testimony and motions for summary judgment. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). Where there are genuine,

conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact. *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) ("Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.").

Not so in the case of preliminary motions to exclude expert testimony under *Daubert*, which are resolved under Rule of Evidence 104(a). Here, trial courts are not bound by the rules of evidence, are not required to view the evidence in a light favorable to the non-movant, and may preliminarily resolve conflicting issues of fact relevant to the *Daubert* admissibility ruling. N.C.G.S. § 8C-1, Rule 104(a). Taking advantage of these procedural differences, a party may use a *Daubert* hearing to exclude an opponent's expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment. By contrast, a party who directly moves for summary judgment without a preliminary *Daubert* determination will not likely fare as well because of the inherent procedural safeguards favoring the non-moving party in motions for summary judgment.

In such instances, we are concerned that trial courts asserting sweeping pre-trial "gatekeeping" authority under *Daubert* may unnecessarily encroach upon the constitutionally- mandated function of the jury to decide issues of fact and to assess the weight of the evidence. *See* N.C. Const. art I, § 25. *See also Brasher*, 160 F. Supp. 2d at 1295 (applying *Daubert*, but acknowledging that "[f]or the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case"); *Logerquist v. McVey*, 196 Ariz. 470, 488, 1 P.3d 113, 131 (2000) ("The *Daubert/Joiner/Kumho* trilogy of cases . . . puts the judge in the position of passing on the weight or credibility of the expert's testimony, something we believe crosses the line

between the legal task of ruling on the foundation and relevance of evidence and the jury's function of whom to believe and why, whose testimony to accept, and on what basis."); *Bunting v. Jamieson*, 984 P.2d 467, 472 (Wyo. 1999) (adopting *Daubert*, but nonetheless expressing concern that "application of the *Daubert* approach to exclude evidence has been criticized as a misappropriation of the jury's responsibilities. . . . '[I]t is imperative that the jury retain its fact-finding function.'" (citations omitted)). Although our criticism of *Daubert* is largely anecdotal and by no means exhaustive, given the serious implications of these concerns, we believe that on balance the North Carolina law which has coalesced in *Goode* establishes a more workable framework for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. Long before *Daubert* was decided, North Carolina had in place a flexible system of assessing the foundational reliability of expert testimony, the practicability of which is evidenced by the case law. Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair. We therefore expressly reject the federal *Daubert* standard upon which both the trial court and the Court of Appeals erroneously based their respective rulings. North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."

Ruiz-Troche, supra, is a good example of of the need for reconciliation between the !st Circuit and the 4th Circuit. (This highlights the conflict between the two circuits, already highlighted by the trial judge in the **Woburn** case relying on the medical opinions of Dr. Levin.) It is significant to note that this case compares with the case sub judice on the issues of "dose" and "peer review".

"The publication of these pieces and their exposure to peer review serve as independent indicia of the reliability of the half-life technique. By the same token, publication and peer review also demonstrate a measure of acceptance

of the methodology within the scientific community. " "Dr. O'Donnell's technique has been subjected to, and survived, the rigors of testing, publication, and peer review, and it appears to have won significant (if not universal) acceptance within the scientific community. **Daubert** does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct. As long as an expert's scientific testimony rests upon "good grounds, based on what is known," **Daubert**, 509 U.S. at 590 (internal quotation marks omitted), it should be tested by the adversary process competing expert testimony and active cross-examination - rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies, see id. at 596. " **Ruiz-Troche, supra.**

We again address point (4) of Defendant's Brief on page 10, having just addressed the others. The defense insists the Marsh cancer was caused by smoking; but Dr.Levin distinguished the case sub judice from smoker-lung cancer cases since Mr. Marsh suffered from an undifferentiated large cell tumor while smokers generally suffer from small cell cancer. Mr. Marsh's tumor is rare in older cigarette smokers. **Dr. Levin testified, excluding other possible confounding or contributing etiologies, "The majority of lung cancers can be categorized into four histologic types. Squamous cell carcinoma, small-cell undifferentiated carcinoma, large-cell undifferentiated carcinoma, and adenocarcinoma 31 . There is a well established direct correlation between the dose of cigarette smoke and the first two types of cancer. The type of cancer that Mr. Marsh suffered (undifferentiated large cell) is not correlated with the dose of cigarette smoke. It's incidence is actually inversely related to the dose of cigarette smoke and is not common in people over 60." (Note: Defendants quote on page 9 of their brief is taken out of the context of his entire testimony.)**

The analysis by the 1st Circuit of the medical opinions on these issues supports a reversal of the case sub judice in which the trial judge and the 4th Circuit did not consider peer review

publications relied on by Dr. Levin and Dr. Brenneman published by the prestigious American Medical Association and a Swedish University Hospital Case Control Study, which identifies picloram and 2,4D as phenoxy acids that are "a causative factor in malignant lymphoma." The trial judge and the 4th Circuit; therefore, erred in basing their decision and opinion on the mistaken belief that picloram cannot cause cancer. This case is most egregious for the wrong side winning because of procedural rulings. The Petition should be allowed.

CONCLUSION

It is respectfully submitted that the Judgment of the Trial Court should be reversed; and the Rule 60 Motion heard.

Respectfully submitted,

JOHN RANDOLPH INGRAM
618 Sunset Avenue - Suite 100
Asheboro, NC 27203
Telephone: (843) 455-3301
Petitioners' Counsel of Record